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Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 2005

GEORGE WEBB,

Petitioner,

v.

LEVEL 3 COMMUNICATIONS, LLC,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), this Court held that in cases of employment discrimination, circumstantial evidence is admissible and probative of pretext and that other evidence of discriminatory animus is not required to survive summary judgment. Circumstantial evidence was accorded just as much weight in discrimination and retaliation cases as in any other kinds of cases in which summary judgment motions were considered. Summary judgment standards were no different for discrimination and retaliation cases than any other kinds of cases before the federal courts.

However, since *Reeves, supra*, certain appellate courts have created mechanisms to alter summary judgment standards in discrimination and retaliation cases. Hybrid summary judgment standards have been *de facto* created as appellate courts have established and now entrenched new tools of discounting plaintiffs' evidence. In doing so, discrimination and retaliation victims are being denied the typical means of proving pretext and are not being treated equally under the law in the summary judgment context.

QUESTIONS PRESENTED (cont'd)

The questions presented are:

Whether to prove pretext an employee can present *objective* evidence of his own qualifications and performance, including as compared to others outside the protected class, without having it discounted by the court as mere opinion.

Whether in selecting an employee for termination, a corporation's total deviation from announced criteria for reduction in force is sufficient to prove pretext.

Whether prior acts against plaintiff and in favor of others outside the protected class are relevant to prove pretext.

Whether subsequent acts against an employee after termination, such as denial of retirement benefits, are relevant to prove pretext.

Whether in a discrimination case, circumstantial evidence must be considered as a whole, not piecemeal, just as in any other case before the court.

Whether in a discrimination case, all reasonable inferences from the evidence should be drawn in favor of the non-movant.

QUESTIONS PRESENTED (cont'd)

Whether upon a summary judgment motion in a discrimination case, issues of credibility should not be explicitly or implicitly determined by the court.

Whether in a discrimination case, the court should conduct a sensitive inquiry as to evidence of discriminatory animus and pretext.

Whether an employer's decision to terminate an employee, which decision is substantially subjective, demonstrates pretext sufficiently to obviate summary judgment.

Whether a prima facie case of retaliation requires proof of a causal connection between the statutorily protected activity and the adverse action.

PARTIES TO THE PROCEEDING

There are no parents or subsidiaries known to petitioner.

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AN INCREASING NUMBER OF COURTS OF APPEALS ARE VIEWING CIRCUMSTANTIAL EVIDENCE IN A LIGHT MOST FAVORABLE TO THE MOVANT, IN VIOLATION OF SUMMARY JUDGMENT STANDARDS, THUS DENYING DISCRIMINATION VICTIMS EQUAL PROTECTION OF THE LAW.

AN INCREASING NUMBER OF COURTS OF APPEALS ARE DENYING DISCRIMINATION VICTIMS THE RIGHT TO PRESENT OBJECTIVE EVIDENCE OF THEIR OWN QUALIFICATIONS AND PERFORMANCE, INCLUDING AS COMPARED TO OTHERS OUTSIDE THE PROTECTED CLASS, WITHOUT HAVING IT DISCOUNTED BY THE COURT AS "MERE OPINION." HAVING ALREADY BEEN FIRED AND ISOLATED, DISCRIMINATION VICTIMS ARE THUS LEFT WITHOUT MEANS OF PROVING THEIR QUALIFICATIONS AND PERFORMANCE, WHILE AT THE SAME TIME THE COURTS ARE ACCEPTING SUBJECTIVE OPINIONS FROM THE COMPANIES THAT FIRED THEM.

AN INCREASING NUMBER OF COURTS OF APPEALS ARE MAKING CREDIBILITY DETERMINATIONS UPON MOTIONS FOR SUMMARY JUDGMENT IN DISCRIMINATION CASES, AND DOING SO ADVERSELY TO DISCRIMINATION VICTIMS.

DEVIATION FROM ANNOUNCED CRITERIA FOR REDUCTION IN FORCE SHOULD SUFFICE TO PROVE PRETEXT. IF NOT, THEN A COMPANY'S REDUCTION IN FORCE WILL ALWAYS INSULATE A DISCRIMINATORY TERMINATION AND DEFEAT A VALID CLAIM.

PRIOR ACTS AGAINST A DISCRIMINATION VICTIM SHOULD BE RELEVANT TO THE ISSUE OF PRETEXT IF THEY ARE LOGICALLY CONNECTED TO THE HARM ULTIMATELY SUFFERED BY THE EMPLOYEE.

SUBSEQUENT ACTS AGAINST AN EMPLOYEE AFTER TERMINATION, SUCH AS DENIAL OF RETIREMENT BENEFITS, SHOULD NOT BE *IPSO FACTO* IRRELEVANT MERELY BECAUSE SAID ACTS CAME AFTER TERMINATION. ALL CIRCUMSTANTIAL EVIDENCE OF ANIMUS AND PRETEXT SHOULD BE RELEVANT IN A DISCRIMINATION CASE.

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Petitioner George Webb ("petitioner" or "Webb") respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals was not reported, and is set forth at Appendix, pp. 1a-20a. The underlying opinion of the district court was not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623, provides as follows:

> It shall be unlawful for an employer-- (1) to . . . discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> . . . .

> (d) Opposition to unlawful practices . . . . It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section . . . .

STATEMENT OF THE CASE

A. Factual Background

On January 16, 2003, a Colorado corporation (Level 3) announced a reduction in force (RIF) and terminated an employee named George Webb, who was 60 years old. He had been the 54th employee hired in the new fiber optics communications company that now numbered about 2,000 employees. He had previously worked for 26 years at another communications corporation, and Level 3 hired him to tap into his expertise in a certain technical area. He was informed so by Level 3 and then worked an ensuing five years at his new job.

Level 3 was a young company both in terms of its own existence and in terms of the ages of its employees. In a prior case, the Tenth Circuit found as follows: "The workforce at Level 3 was primarily under forty." *See, Abuan v. Level (3) Communications, Inc.*, 353 F.3d 1158, 1165 (10th Cir. 2003). In *Abuan*, a jury finding of age discrimination was upheld upon evidence of a young work force with little senior oversight. Plaintiff himself had directly observed that the company was made up primarily of males in their 20s and 30s, and the number of employees older than that was in the low single digits.

This was an objectively observable fact. In the instant case, the Tenth Circuit found that, "Level 3's workforce is young." Appendix, at 8a-9a.

At the time of the RIF on January 16, 2003, the president of the company announced the criteria for selecting those employees to be terminated, as follows: (a) performance; (b) skills and qualifications; (c) tenure with the company. While plaintiff was terminated in the same RIF, upon investigation he learned that the criteria were not applied to him at all. If they had been, he could not have been selected. Instead, a human resources manager informed plaintiff that he had been terminated because his position had been eliminated. This directly contradicted the announced RIF criteria.

Upon further investigation, plaintiff learned that there had been eight other employees at the company with his same title, Program Manager II (which is a more advanced title than Program Manager). All were under 45 years old except for plaintiff, as disclosed by the RIF printout provided to him when he was terminated. Plaintiff was the 60-year-old on the RIF printout, and the only member of the "Affected Population" with the job title of Program Manager II to be terminated. He was also the only one of his peers in his unit terminated in the RIF, and he was the eldest of his peers. All of the above were objectively observable facts and not merely expressions of plaintiff's own opinion.

Among the employees not terminated in the RIF were several with whom plaintiff had directly worked and whose duties and performance he had directly observed. They were all under 40 years old and had been at the

company two or possibly three years. Plaintiff had worked there five years.

While working at the company, plaintiff's formal performance evaluations were excellent, i.e. "at or above" expectations. The company considered him to be the "most senior" member of his staff, and placed an unusually heavy workload on him according to the company's own written evaluations. He "performed tremendously," superiors wrote. He was also described in writing in the following way: "As the senior member of the team, my expectations for him were well higher than the other members of the team. George not only met those expectations, but exceeded them."

To the extent that any of the above characterizations of plaintiff's performance were subjective, they were made, not by plaintiff himself, but by the company managers above plaintiff. Thus they constitute strong evidence in a discrimination case, evidence that plaintiff was not only a senior member of the staff but a valued one who performed excellently with an unusually heavy workload being placed on him, and measuring up to standards that were higher for him than others.

Plaintiff had previously been transferred into his job as Program Manager II and believed such a transfer made him vulnerable to RIF termination. It is agreed that this was a subjective point of view. However, plaintiff's subjective prediction turned out to be true, which is an objective fact. When plaintiff was transferred to the job of Program Manager II, his prior job duties were not eliminated but were given, instead, to a younger employee. This objective fact was followed

by the further objective fact that, contrary to routine, the company then provided no planning for plaintiff's future career progression, as it did for other, younger employees. Plaintiff developed the subjective view that he had been made vulnerable to RIF termination, which turned out to be true (itself an objective fact).

During his career at the defendant corporation, plaintiff had observed favoritism toward younger employees, based upon the following objectively observable facts: Elsa Svensson, in her mid-30s, had had no prior experience in network development and no prior experience as a supervisor, as she readily conceded. Yet the company assigned her to supervise plaintiff and others in network development. These were objectively observable facts.

Plaintiff also observed that most of the peers who had joined the company after he had, were under 40 years old and had already been promoted to director-level jobs, while plaintiff had not been, despite longer tenure at the company and longer pertinent experience both at the company and in the industry. Ninety percent of plaintiff's peers, younger employees who had started at the company at the same time or after he did, had been promoted to director level or above. He named them; all were under 40; only one was older than his mid-30s. These employees were all in network development, where plaintiff worked with them. In learning their backgrounds, experience and tenures since they got out of college, plaintiff objectively recognized that ten younger employees who had already been promoted ahead of plaintiff had less experience in management, less experience in network development, less experience

in engineering and network construction activities (which is what everyone did on the job), and far less time in the industry (let alone in the working world in general since getting out of college). Since plaintiff was getting excellent performance reviews, this raised a concern. Plaintiff's concern was subjective, but the facts upon which it was based, as set forth above, were wholly objective. Knowing that Employee A has had only three years of work since getting out of college, according to that employee's own statements, while Employee B has 33 years, is not an opinion. It is an objective fact. Knowing that Employee A was hired at the company on a certain date, which date was two or three years after Employee B's hire date, is not an opinion. It is an objective fact. Plaintiff named the many employees whose comparative experience and tenure were markedly inferior to plaintiff's. It is an objective fact that those employees were promoted to director, while plaintiff was not.

Two of the employees under 40 years old mentioned above were promoted to become plaintiff's supervisors. Moreover, two of plaintiff's younger peers were moved into their jobs as recently as June 2002, and plaintiff helped train them for their jobs. Plaintiff was qualified for those jobs (based upon observing the job duties involved and knowing his own qualifications). These are objective facts from plaintiff's direct experience, observation and discussion with fellow employees about the duties they performed.

Rather than carp unprofessionally or let his performance suffer, plaintiff decided to register his concerns with the human resources department. On

November 14, 2002, he met with a corporate human resources representative, and, upon that representative's inquiry, plaintiff explained that there was evidence of age discrimination ("I believe a case could be made that I was discriminated against" because of age). Plaintiff also expressed to the human resources representative that he was being underutilized by a company dominated by younger males and that the company had a disproportionately low number of older males. The human resources representative took handwritten notes during plaintiff's discussion about discrimination, but said notes have never been found.

With regard to plaintiff's comments about discrimination, the company conducted no investigation. No one from human resources followed up at all to inquire further about the basis of plaintiff's comments, and the company would later explain that this was because plaintiff did not request an investigation.

Plaintiff's comments about discrimination to the human resources department were thus made in good faith, and he had a belief that they were protected against retaliation in any form.

Two months later, on January 16, 2003, plaintiff was terminated in the RIF. As discussed *supra*, plaintiff, at age 60, was the only Program Manager II impacted in the entire company, the only one of his peers in his unit terminated, and his selection for termination did not meet the RIF criteria announced by the company.

Well prior to the RIF termination, an employee named Pearce had been assigned to transition into

plaintiff's duties. This was explained to plaintiff by a manager above them. Plaintiff had been Pearce's "mentor" and "teacher," according to Pearce himself. Plaintiff had to teach Pearce what he needed to know in order to assume plaintiff's duties in the California market. Pearce had been in the industry far fewer years than plaintiff, and at the company fewer years, according to Pearce himself. Pearce was under 40 years old. The above are objective facts.

After his termination, plaintiff developed a belief, based upon the objective facts discussed *supra*, that the announced RIF criteria had been ignored in his own termination. So he asked in writing for a further explanation of the application of the RIF criteria to himself. The company failed to provide him with any elaboration of the RIF criteria nor with any comparisons, standards, or other delineation of objective application of the RIF criteria to him or anyone else.

In this litigation, the company was required to explain the basis of its actions pursuant to the discovery rules. The sole explanation for the RIF selection of plaintiff was completely subjective, coming from the "ultimate" decision-maker (named Leddy). His only pertinent statement of analysis was that, "I considered input from Mr. Webb's direct supervisor, Davetta Garcia." Leddy otherwise had no first-hand basis to select plaintiff to be terminated in the RIF. For her part, Garcia averred only that she weighed the number of accounts, "performance and job evaluations," "whether that individual was a player," "and what additional benefits that individual contributed to my group," among other [unnamed] things.

Neither Garcia -- nor any documentation in this case -- has ever set forth objective support for the above subjective opinions regarding plaintiff. The company has never provided any documents or other evidence of an objective comparison to support any of the above subjective opinions of a single manager as communicated to another manager (Garcia to Leddy). There has never been any delineation of the unknown method by which Garcia "ranked" the employees (as she claimed to have done), or even how she compared their performance and job evaluations (as she claimed to have done), let alone how she determined who was or was not "a player" and "what additional benefits that individual contributed to my group."

In sum, the selection of plaintiff to be terminated in the RIF went on inside the head of a single manager. It was a classically and totally subjective determination.

The Tenth Circuit had previously condemned such a *non*-process. In *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1215-17 (10th Cir. 2002), the Tenth Circuit wrote (in reversing the trial court) that the defendant corporation, "offered virtually no evidence to support its characterization of the ranking system [that led to the challenged personnel action]. It presented no set of objective criteria by which employees are differentiated. In fact, nowhere in the record is it shown how rankings were determined in these meetings. Contrary to the district court's conclusion, on this record a jury could reasonably find that in the ranking process, the opinion of an employee's supervisor was the basis on which rank is established. . . . Courts view with skepticism

subjective evaluation methods such as the one here." [citations omitted]. Just as in *Garrett, supra*, in the instant case, "the opinion of an employee's supervisor was the basis on which rank is established." This process was condemned in *Garrett* (but not in the instant case, as will be discussed *infra*).

Upon terminating plaintiff, the decision-maker (Leddy) met with plaintiff in a room and spontaneously asked plaintiff if he thought he had been discriminated against. This question, coming without pre-suggestion from plaintiff in the face-to-face meeting, demonstrated that Leddy was well aware that plaintiff had been communicating his discrimination concerns to the human resources department. Leddy protested that he was unaware of such prior complaints, but his spontaneous question at the time of firing, combined with plaintiff's compelling proof of pretext in the selection of plaintiff to be terminated in the RIF, raised an issue of credibility for jury determination.

After plaintiff was terminated, the company advertised job openings for which he was qualified, including an opening specifically for "program manager." He read the requirements in the job advertisements, recognized that he fit them, applied for the jobs and never received a response, in violation of the company's own applicant procedures.

At the time of his termination in the RIF, plaintiff was eligible to retire. One of the options offered to RIFed employees, including plaintiff, was retirement if they qualified therefor (which plaintiff did). In pursuit of that option, plaintiff wrote to the company to ask

some questions in order to make a decision. Plaintiff pressed his inquiry regarding retirement, and a series of letters ensued. He wrote that, "I believe the termination was improper and the result of age discrimination" but wished to apply for retirement. The human resources department declined to process his retirement application, passing the request to the legal department, saying that it did so because plaintiff had hired a lawyer.

But the legal department refused to process the application, saying that plaintiff no longer worked for the company. This should have made no difference, as plaintiff, like all RIFed employees, was told that the option of retirement was available to him and this was patently at a point after all the RIFed employees had been terminated.

Plaintiff's application for retirement benefits was never processed by the company, and to the present he has been denied the right to retire.

In sum, the above are objectively observable facts.

B. Proceedings in the District Court

Plaintiff brought claims of age discrimination and retaliation in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq*.

After a period of discovery, the defendant corporation filed a motion for summary judgment, which the trial court granted in its entirety, dismissing the entire case.

Plaintiff then appealed to the Court of Appeals for the Tenth Circuit, which had jurisdiction pursuant to 28 U.S.C. § 1291.

C. Decision of the Court of Appeals

The Tenth Circuit ruled that the company did not dispute that plaintiff had set forth a prima facie case of age discrimination [Appendix, at 6a] but upheld the trial court in granting summary judgment and dismissing the entire case, ruling that plaintiff had not shown pretext. Appendix, at 16a and 20a. As to plaintiff's claim of retaliation, the Tenth Circuit ruled that the person who took the action against plaintiff (Leddy) was unaware of plaintiff's protected activity and therefore it did not matter how closely his termination followed his complaint of discrimination to the human resources department (and other evidence of retaliation was insufficient to establish a prima facie case of retaliation or, if so, pretext). Appendix, at 19a-20a.

With regard to the issue of pretext, the Tenth Circuit ruled that:

--Inconsistencies in the application of RIF criteria did not show pretext. Appendix, at 7a.

--The young age of the company's workforce ("Level 3's workforce is young.") is insufficient without more to raise an issue of pretext. Appendix, at 8a-9a.

--Plaintiff's comparison with younger employees treated more favorably was immaterial for summary judgment purposes because these comparisons were

merely expressions of plaintiff's own "opinion" and constituted only "vague generalities and speculation." Appendix, at 9a, 12a-13a.

--Prior acts against plaintiff were not tied to plaintiff's termination in the RIF and were therefore irrelevant to the issue of pretext. Appendix, at 10a.

--Post-termination acts, including failure to permit plaintiff to retire, were irrelevant to the issue of pretext because they occurred after plaintiff was terminated. Appendix, at 11a.

--Subjective decision-making "does not suffice to prove intentional discrimination." Appendix, at 13a.

--The decision to terminate plaintiff was in part objective and that defeats a showing of pretext. Appendix, at 13a-14a.

--After plaintiff's termination, his duties were divided up among other employees, and that defeats a showing of pretext. Appendix, at 15a.

--Plaintiff's allegation that placement in another position made him vulnerable for the ultimate RIF was mere "speculation." Appendix, at 15a-16a.

REASONS FOR GRANTING THE PETITION

I.

AN INCREASING NUMBER OF COURTS OF APPEALS ARE UPHOLDING PIECEMEAL ANALYSES OF PRETEXT AND ARE FAILING TO CONDUCT SENSITIVE INQUIRIES INTO THE ENTIRE ARRAY OF CIRCUMSTANTIAL EVIDENCE PRESENTED BY DISCRIMINATION VICTIMS. CIRCUMSTANTIAL EVIDENCE AS TO PRETEXT IN DISCRIMINATION CASES IS BEING WEIGHTED DIFFERENTLY THAN CIRCUMSTANTIAL EVIDENCE IN OTHER CIVIL CASES.

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AN INCREASING NUMBER OF COURTS OF APPEALS ARE DENYING DISCRIMINATION VICTIMS THE RIGHT TO PRESENT *OBJECTIVE* EVIDENCE OF THEIR OWN QUALIFICATIONS AND PERFORMANCE, INCLUDING AS COMPARED TO OTHERS OUTSIDE THE PROTECTED CLASS, WITHOUT HAVING IT DISCOUNTED BY THE COURT AS "MERE

OPINION." HAVING ALREADY BEEN FIRED AND ISOLATED, DISCRIMINATION VICTIMS ARE THUS LEFT WITHOUT MEANS OF PROVING THEIR QUALIFICATIONS AND PERFORMANCE, WHILE AT THE SAME TIME THE COURTS ARE ACCEPTING SUBJECTIVE OPINIONS FROM THE COMPANIES THAT FIRED THEM.

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PRIOR ACTS AGAINST A DISCRIMINATION VICTIM SHOULD BE RELEVANT TO THE ISSUE OF PRETEXT IF THEY ARE LOGICALLY CONNECTED TO THE HARM ULTIMATELY SUFFERED BY THE EMPLOYEE.

SUBSEQUENT ACTS AGAINST AN EMPLOYEE AFTER TERMINATION, SUCH AS DENIAL OF RETIREMENT BENEFITS, SHOULD NOT BE *IPSO FACTO* IRRELEVANT MERELY BECAUSE SAID ACTS CAME AFTER TERMINATION. ALL CIRCUMSTANTIAL EVIDENCE OF ANIMUS AND PRETEXT SHOULD BE RELEVANT IN A DISCRIMINATION CASE.

This petition presents a large number of issues, but they are all intertwined to demonstrate a trend to limit discrimination plaintiffs' rights to present circumstantial evidence in opposition to motions for summary judgment. The trend is to delimit evidence permitted by *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) for a showing of pretext. The trend demonstrates increasingly divergent opinions of the courts of appeals and the development of a new summary judgment standard for discrimination victims -- not the same standard that applies to other civil cases involving circumstantial evidence. In that diverse respect, and with regard to the devices employed to dismiss a valid case of age discrimination herein, the opinion below conflicts with this Court's prior decisions and represents a *de facto* new summary judgment standard when circumstantial evidence of pretext is presented.

This is necessarily a fact-based petition, as that is the only way to seek review of such a degrading trend in the various standards for circumstantial evidence in discrimination cases. Reemphasizing the non-onerous

circumstantial proof of discrimination permitted by *Reeves*, *supra*, is necessarily a fact-based consideration.

The Eight and Ninth Circuits have taken it to the extreme with a heightened level of evidentiary proof being required to show pretext sufficient to avoid summary judgment. They have established a standard that a showing of pretext sufficient to obviate summary judgment can be made only by direct evidence or by "specific and substantial" or "substantial" circumstantial evidence. *See, Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1029 (9th Cir. 2006); *Bodett v. CoxCom, Inc.*, 366 F.3d 736, 743 (9th Cir. 2004); *Manatt v. Bank of America, NA*, 339 F.3d 792, 803 (9th Cir. 2003); *Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061, 1066 (9th Cir. 2003); *Bergene v. Salt River Project Agr. Imp. and Power Dist.*, 272 F.3d 1136, 1142, (9th Cir. 2001); *Godwin v. Hunt Wesson, Inc.* 150 F.3d 1217, 1222 (9th Cir. 1998); *Cherry v. Ritenour School Dist.*, 361 F.3d 474, 479 (8th Cir. 2004).

In the seminal case of *Godwin, supra*, at 1222, the Ninth Circuit established its own new evidentiary standard, thereafter followed in scores of lower court cases, as follows:

> In those cases where direct evidence is unavailable, however, the plaintiff may come forward with circumstantial evidence that tends to show that the employer's proffered motives were not the actual motives because they are inconsistent or otherwise not believable. Such evidence of "pretense" must be "specific" and "substantial" in order to create a triable issue

with respect to whether the employer intended to discriminate on the basis of sex.

Other courts, including the Tenth Circuit, have implicitly adopted a *de facto* higher level of circumstantial evidence required in discrimination cases, as in the instant case. Thus, plaintiff herein presented significant, multi-pronged circumstantial evidence of pretext only to have the court of appeals discount it totally by use of certain devices, as demonstrated in the following discussion:

The Tenth Circuit will not ordinarily accept as circumstantial evidence a discrimination victim's *objective* assessments of his own qualifications and performance, and the *objective* assessments of the qualifications and performance of comparators. The appellate court simply declares such evidence from the plaintiff to be inadmissible *opinion*. Thus, in the instant case, the plaintiff well-established (1) his own qualifications, *based upon his own direct knowledge of them*, (2) the qualifications of comparators, *who disclosed those qualifications to him*, (3) his own performance, *as expressed in performance evaluations by the company*, (4) the performance of comparators, *as he directly observed it on the job*, (5) his own long tenure at the company and in the industry, *based upon his own direct knowledge of it*, (6) the comparative short tenure of comparators both at the company (*observed directly by him*) and in the industry, *as disclosed by them to plaintiff*, (7) the fact that lesser qualified comparators were promoted to director, *as plaintiff directly observed it*, (8) the fact that plaintiff was not promoted to director,

based upon his own direct knowledge, (9) the fact that comparators whom plaintiff trained as they arrived at the company were promoted ahead of plaintiff, *based upon his own direct knowledge and observation*.

In summary fashion, the Tenth Circuit labeled this to be *opinion* evidence that does "not establish a material factual dispute on the issue of pretext." Appendix, at 9a. It added: "It is the manager's perception of the employee's performance that is relevant, not plaintiff's subjective evaluation of his [or her] relative performance." *Id.*

Such a generic discounting of eyewitness testimony *just because it comes from the plaintiff himself*, which rendition is being repeated in cases throughout the nation, demotes discrimination victims to second-class witnesses. An employee who knows his own work history (for example, 26 years with a prior company and five years with the instant company) and knows his own performance ratings as handed to him year after year by the instant company (for example, rated "at or above" at all times, given an unusually heavy workload and performing "tremendously" as the "most senior member" of the staff, as reflected in the company's own paperwork) surely can recount these facts as a matter of eyewitness testimony or testimony of what the company communicated directly to him in writing. This is objective evidence. To dismiss it out of hand as *mere opinion* is akin to dismissing the first-hand account of a Titanic passenger that the ship sank.

Likewise, an employee who has *directly observed* the performance and promotion history within the company

of comparators not in the protected class, and who has had said comparators recount their own histories of work and experience to him, can testify to said eyewitnessed events (and ear-witnessed words). An employee can testify that he was the only 60-year-old to be fired in the RIF when he was handed a RIF printout listing him there (and listing him as the only Program Manager II terminated in the entire company). And he can testify that he was the only employee in his entire unit who was fired in the RIF. Again, this is not opinion evidence. These are objective facts, including objective facts *prepared by the company*.

Petitioner concedes that the veracity of the decision-maker regarding his opinion of the plaintiff's performance is pertinent to the analysis of pretext. *See*, *Kendrick v. Penske Transp. Services, Inc.* 220 F.3d 1220, 1231 (10th Cir 2000). However, plaintiff's *actual* performance is relevant to determine if the decision-maker's opinion is accurate and believable. Credibility is always at issue, and the fact that plaintiff was actually performing well as reflected in the company's own documents (and in manager's words to plaintiff) is classically relevant to a determination of whether the decision-maker's explanation is suspicious, rife with mendacity and pretextual. An employer's manager can claim that he is terminating an employee because the employee was a poor performer, but that employee can challenge the credibility of such a determination by presenting objective evidence (known to the company) that he was a good performer, and therefore the manager's determination is, at a minimum, sufficiently suspicious to obviate summary judgment.

But the Tenth Circuit's declaration that such evidence, from the plaintiff's mouth, is mere opinion, removes from the plaintiff's arsenal one of the strongest weapons he has to prove pretext. Having been terminated from the company and escorted off the grounds, the playing field is left to the devices of the company, which controls all of the witnesses still on its payroll. And the court of appeals has roundly declared that the company's managers can express their opinions, even subjective opinions, as in the instant case. Plaintiffs must be reserved the opportunity to attack the logic or reasonableness of those subjective opinions of management and reserve the right to do so based upon plaintiffs' own *objective* recounting of performance and qualifications.

Similarly, the Tenth Circuit discounted such evidence even for use as background information leading up to the ultimate discriminatory acts. Thus, in the instant case, the appellate court simply declared that a pattern of prior wholesale favoritism toward younger employees, including a pattern of promoting lesser qualified comparators with less tenure at the company and in the industry (some soon after leaving college), was not relevant because such events could not "be connected to the employment action at issue." Appendix, at 9a. Such a demonstrated company bias is relevant to a closely following act of discrimination against yet another employee, especially when there patently are mechanisms at work that have caused the company to be "young," as the Tenth Circuit expressly found. Appendix, at 8a-9a.

There is no valid evidentiary reason, or reason of logic, or reason of business sense, why a discrimination victim's objective assessment of his own qualifications and performance should not be treated the same as assessments by management. To rule otherwise is to relegate discrimination victims to the status of second class witnesses (or non-witnesses) in their own cases.

For certain limited purposes, the Tenth Circuit has in the past credited an employee's testimony about his own performance even when disputed by the employer. *See, Kenworthy v. Conoco, Inc.*, 979 F.2d 1462, 1470 (10th Cir. 1992). However, that was only for the purpose of establishing a prima facie case of discrimination.

Subsequently, in *Furr v. Seagate*, 82 F.3d 980, 988 (10th Cir. 1996), the Tenth Circuit articulated a rule that an employee's own *subjective* evaluation of his own performance was valueless in the summary judgment context. Fair enough. But then, in 1999, the Tenth Circuit went further and adopted a rule of law previously created by the Seventh Circuit, that an employee's "own opinions about his performance or qualifications" do not "give rise to a material factual dispute." *See, Simms v. Oklahoma*, 165 F.3d 1321, 1329 (10th Cir. 1999) *cert. denied*, 528 U.S. 815, 120 S.Ct. 53, 145 L.Ed.2d 46 (1999), [*citing Rabinovitz v. Pena*, 89 F.3d 482, 487 (7th Cir. 1996)]. Without differentiating between an employee's subjective or objective opinions of his own performance and qualifications, that rule of law has now been cited in other courts as a reason to totally discount an employee's testimony. *See, inter alia, Lee v. GTE Florida, Inc.*, 226 F.3d 1249 (11th Cir. 2000); *Kess v. Municipal Employees Credit Union of Baltimore, Inc.*,

319 F.Supp.2d 637 (D. Md. 2004); *Cuenca v. University of Kansas*, 265 F.Supp.2d 1191 (D. Kan. 2003); *Gonzales v. American Family Life Assur. Co.*, 202 F.Supp.2d 1373 (M.D. Ga. 2002). Courts within the Tenth Circuit have cited the newfound rule of law in a myriad cases. Plaintiffs in discrimination cases simply are forbidden to present testimony, even objective testimony, of their own performance and qualifications. It is being struck as mere opinions.

This line of cases, and the decision in the instant case, run contrary to the teaching of *Reeves, supra*, that questions of fact are to be approached the same in discrimination cases as in other cases. *Id.*, at 148. "It therefore follows that, in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record." *Id.*, at 150. [emphasis added]. ". . . In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Id.*

Thus, as just one example among a dozen in this case, the Tenth Circuit was required to take as true that plaintiff had previously been evaluated by the company as "at or above" expectations. The company considered him to be the "most senior" member of his staff, and placed an unusually heavy workload on him according to the company's own written evaluations. He "performed tremendously," superiors wrote. He was also described in writing in the following way: "As the senior member of the team, my expectations for him were well higher than the other members of the team. George not only met those expectations, but exceeded them."

Furthermore, plaintiff's objective evidence as to his own qualifications, prior and present experiences, and his observations of the same in comparators (or discussions with them and their backgrounds and qualifications) should not have been discounted to zero as mere expressions of opinion. Indeed, in *Reeves, supra*, at 144-47, this Court found plaintiff's own rendition of his own observations in the workplace to be relevant in obviating summary judgment and did not declare them to be mere opinions, or otherwise useless for summary judgment purposes.

This "mere opinion" line of cases from the Tenth Circuit and from other circuits is a *de facto* variety of the new rule of law in two other circuits that pretext may be shown in discrimination cases only by "specific and substantial" or "more substantial" circumstantial evidence. *See, Cornwell, supra; Bodett, supra, Manatt, supra; Stegall, supra, Bergene, supra; Godwin, supra; and Cherry, supra.* This is an increased evidentiary burden and is akin to requiring "clear and convincing evidence," which is an entirely different, and more onerous, standard in the law.

Such an increased burden also cuts against the reality of discrimination cases, in which "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." *See, Reeves*, at 141. Such questions are "sensitive and difficult." *Id.* They do not deserve a tougher standard across the nation.

Instead, circumstantial evidence in discrimination cases should be treated the same as direct evidence, with no greater burden of production or required weight. As

this Court has ruled in another context, "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *See, e.g., Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 508 n. 17, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957) [citing *The Robert Edwards,* 19 U.S. (6 Wheat.) 187, 190, 5 L.Ed. 238 (1821)]. Indeed, in *Reeves, supra*, at 134 and 150 this Court ruled that, upon a motion for summary judgment, the trial court was not to weigh the evidence at all.

Also indicative of the Tenth Circuit's rejection of circumstantial evidence, or at least the weighing thereof against plaintiff, was its determination that plaintiff's firing in contravention of the announced RIF criteria was insignificant. Appendix, at 7a. While the Tenth Circuit labeled these "minor inconsistencies in the application of RIF criteria," the company announced one set of criteria for selecting employees to be laid off (performance, skills, qualifications, tenure) and, when confronted with the notion that plaintiff didn't fit the criteria, informed plaintiff that he was being laid off, instead, for a different reason -- his job had been eliminated. To discount such powerful circumstantial evidence of pretext, the evidence was *weighed* by the Tenth Circuit, in violation of the tenets of *Reeves, supra*, at 134 and 150.

Other forms of circumstantial evidence were also weighed and discounted by the Tenth Circuit in this case, including the following: the background level of a workforce dominated by young people with little senior supervision; a prior reassignment of plaintiff to a job that made him more vulnerable to layoff; failure thereafter to

provide career planning typical for other, younger employees; comparatively better treatment of younger employees in multiple, specific ways proven by objective evidence; post-termination denial of retirement benefits, the fact that he was the only Program Manager II in the entire company and the only employee among his peers terminated in the RIF, a post-RIF job opening for Program Manager for which he did not even get an interview, and other circumstantial facts. The Tenth Circuit weighed and discounted these items of circumstantial evidence *piecemeal*, inadvertently missing the forest for the trees. Instead, all of the pieces of evidence (whether they be circumstantial or not) should have been weighed together, even if "none [was] conclusive in itself," creating a "convincing mosaic" of circumstantial evidence. *See, Walker v. Board of Regents of University of Wisconsin System*, 410 F.3d 387, 394 (7th Cir. 2005) [*citing, Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 140 F.3d 716, 723 (7th Cir.1998)].

This case and its announced conclusions suggest that the facts and their reasonable inferences were viewed in a light most favorable to the movant, instead of the other way around, as required by summary judgment procedure (even in discrimination cases). *See, Reeves*, at 149-50.

II.

SUBSTANTIALLY SUBJECTIVE DECISION-MAKING ADVERSE TO A DISCRIMINATION VICTIM SHOULD SUFFICE TO SHOW PRETEXT. IF NOT, THEN A COMPANY'S BALD STATEMENT OF OPINION AS TO THE BASIS OF AN ADVERSE ACTION WILL VITIATE LAWS FORBIDDING DISCRIMINATION.

In this case, the company proffered no documentation as to the *reasons* why plaintiff was selected to be terminated in the RIF. Instead, the company claimed (alternatively to the explanation that his job had been eliminated) that the selection of plaintiff was based upon the *opinion* of a manager who allegedly weighed the following: the number of accounts, "performance and job evaluations," "whether that individual was a player," "and what additional benefits that individual contributed to my group." The company never delineated any objective method or means by which the manager analyzed these factors, came to conclusions within these categories, or ranked the employees. Thus, the basis of plaintiff's selection for termination in the RIF remained totally subjective.

Nonetheless, the Tenth Circuit accepted the above as sufficient evidence to defeat plaintiff's circumstantial showing of pretext, which means that the Tenth Circuit, again, had to have weighed the evidence in contravention of *Reeves, supra*, at 134 and 150. The Tenth Circuit has thus drifted from its earlier tenet that subjective decision-making is an important consideration in pretext. *See, Garrett v. Hewlett-Packard Co.*, 305

F.3d 1210, 1217 (10th Cir. 2002) [Defendant corporation "offered virtually no evidence to support its characterization of the ranking system. It presented no set of objective criteria by which employees are differentiated. In fact, nowhere in the record is it shown how rankings were determined in these meetings. Contrary to the district court's conclusion, on this record a jury could reasonably find that in the ranking process, the opinion of an employee's supervisor was the basis on which rank is established. . . . Courts view with skepticism subjective evaluation methods such as the one here." [citations omitted].

This Court is urged to affirm the rule that totally or substantially subjective decision-making suffices to obviate summary judgment in a discrimination case. If not, then managers' undocumented and conclusory opinions will vitiate discrimination laws in the United States.

III.

A PRIMA FACIE CASE OF RETALIATION DOES NOT REQUIRE PROOF OF A CAUSAL CONNECTION BETWEEN THE STATUTORILY PROTECTED ACTIVITY AND THE ADVERSE ACTION.

A manager's cognizance of the plaintiff's protected action should not be required to establish a prima facie case of retaliation, as the Tenth Circuit required in this case. It is simple for the decision-maker to opine that he didn't know, and no one can get inside his head. Thus, it

should fairly be enough showing that it is *the company* that terminated plaintiff after *the company* became aware through its human resources department that plaintiff had engaged in protected conduct, i.e. complained to HR about discrimination.

As the Seventh Circuit has established, proof of a causal connection between the statutorily protected activity and the adverse employment action is not required to establish a prima facie case of retaliation. *See, Stone v. City of Indianapolis Pub. Utils. Div.*, 281 F.3d 640, 643-44 (7th Cir. 2002) [for a prima facie case of retaliation, no causal connection need be demonstrated; plaintiff need merely show that comparators who did not complain about discrimination did not suffer the adverse action. The company can defeat such a showing only by presenting "unrebutted evidence of a noninvidious reason for the adverse action . . . ."] [emphasis added].

In the instant case, the company's evidence of an innocent reason for firing plaintiff was fairly and roundly rebutted by the plaintiff. Thus, the Tenth Circuit should not have shortstopped plaintiff's establishment of a prima facie case of retaliation by requiring a causal connection to be shown.

Moreover, as a matter of proof in a retaliation case, the decision-maker's "ambiguous statements" suffice to obviate summary judgment. *See, Volovsek v. Wisconsin Dept. of Agr., Trade and Consumer*, 344 F.3d 680, 689 (7th Cir. 2003). At the time of his termination, plaintiff was spontaneously asked by the decision-maker if he believed he was being discriminated against. This

statement is at worst ambiguous under the above criteria. Contrary to the determination of the Tenth Circuit, when taken in a light most favorable to the plaintiff, said statement indicates that the speaker had already been tipped off about plaintiff's concerns regarding discrimination previously communicated to the human resources department. Thus, the speaker's knowledge of plaintiff's protected activity was demonstrated even if a causal connection was required to be shown.

This Court is respectfully requested to affirm the above requirements for establishment of a prima facie case of retaliation as well as for a showing of pretext in a retaliation case.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 24, 2006

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

GEORGE WEBB, Plaintiff-Appellant,	FILED JANUARY 25, 2006 Elisabeth A. Shumaker Clerk of the Court
v.	No. 05-1051
LEVEL 3 COMMUNICATIONS, LLC, Defendant-Appellee.	(D.C. No. 03 MK 1995 (MJW)) (D. Colorado)

ORDER AND JUDGMENT*

Before **BRISCOE, HARTZ,** and **O'BRIEN**, Circuit Judges.

Plaintiff George Webb appeals the district court's order granting summary judgment for defendant, Level 3 Communications, LLC (Level 3), on his claims of age discrimination and retaliation in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I.

In 1997, at the age of fifty-five, Webb began working for a predecessor of Level 3 as a Senior

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Network Developer. Though he experienced some performance problems in 1998, overall Webb's performance met or exceeded expectations.

In 1999, Webb's supervisor inquired as to his willingness to relocate to Colorado. From the conversation, Webb inferred that moving to Colorado would help him advance within the company. Webb asked about a relocation package and believed that relocation expenses would be offered. During that conversation, however, his supervisor did not promise reimbursement and warned: "Don't do anything you can't get out of." App. at 176. Despite the warning, Webb and his wife put a deposit down on a home in Colorado. Early in 2000, Level 3 informed Webb that there was no money in the budget for relocation costs. Webb opted to proceed with the move, and in August 2000, he and his wife moved to Colorado.

In June 2001, Level 3 informed Webb that his position was being eliminated in a reduction in force (RIF) and that he would be terminated effective September 9, 2001. Webb began to think that Level 3 was treating him less favorably because of his age. Webb was saved from termination by Tim Leddy, Vice President of Customer Operations, who hired Webb as a Program Manager in the Customer Operations Department. Webb considered this to be a lateral move. After the move, Level 3 did not provide Webb with plans for his future development, something, he contends, the company routinely provided to younger employees. Webb grew concerned that he "was being set up for the next RIF when it came." App. at 188.

On December 31, 2001, Webb's job title changed to Program Manager II. Between June 2001 and January 2003, Level 3 had several additional RIFs, but Webb survived them.

On November 14, 2002, Webb met with Blake Isom, a Level 3 Human Resources Department representative, for assistance in "finding opportunities that could better utilize [his] experience and expertise . . . " within the company. App. at 166. During their meeting, Isom asked Webb, "Have you ever been discriminated against?" Id. at 167. Webb responded, "[A] case could probably be made for it." Id. at 167, 188. Webb did not file a complaint under Level 3's anti-discrimination policy, and he did not request an investigation into his allegation of discrimination. Isom did not investigate Webb's statement.

In January 2003, Level 3 instituted another RIF for economic reasons. Leddy needed to reduce the number of employees within his division and selected Webb for termination based on customers, work, sales, and input received from his supervisor regarding his performance and ability to contribute to the organization. During the RIF, Level 3 eliminated forty-nine employees: twenty-five were under the age of forty; and twenty-four were forty years old and over.

On January 16, 2003, Level 3 informed Webb that his position was being eliminated and that he was being terminated. Level 3 gave Webb the option of a severance package, which was offered to all impacted employees, or a modified retirement package. Level 3 gave Webb forty-five days to consider the two options. Webb applied for retirement benefits on April 8, 2003, but Level 3 denied his request because he did not apply for benefits within the forty-five day period.

After his termination, Webb applied for other positions with Level 3, for which he contends he was fully qualified. Webb never received an interview. On April 8, 2003, Webb filed a charge of discrimination with the EEOC. A few months later, Webb filed this

action alleging discrimination and retaliation in violation of the ADEA. Level 3 filed a motion for summary judgment on both claims, which the district court granted. The district court found that the RIF was a legitimate nondiscriminatory reason for Webb's termination, and that Webb had failed to show that this reason was pretextual. As to Webb's retaliation claim, the district court held that Webb offered no evidence of a causal connection between the protected activity, Webb's conversation with Isom, and the adverse action, i.e., his termination.

II.

Webb argues that the district court erred in finding that Webb failed to present sufficient evidence of pretext to preclude summary judgment on his discrimination claim. He also contends the district court erred in finding that Webb did not produce sufficient evidence of a causal connection between the protected activity and his termination to set forth a prima facie case of retaliation.

Standard of review

This court reviews de novo a district court's grant or denial of summary judgment, applying the same standard as the district court. Alexander v. Oklahoma, 382 F.3d 1206, 1215 (10th Cir. 2004) (citation omitted). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "We view the evidence, and draw reasonable inferences therefrom, in the light most favorable to the nonmoving party." Combs v. PriceWaterhouse

Coopers LLP, 382 F.3d 1196, 1199 (10th Cir. 2004) (citation omitted).

Discrimination claim

In this case, Webb presented no direct evidence of age discrimination and instead, relied on circumstantial evidence. When a plaintiff relies on circumstantial evidence to demonstrate employment discrimination, we apply the burden-shifting framework set forth in McDonnell Douglas and its progeny. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-07 (1973); Garrett v. Hewlett-Packard Co., 305 F.3d 1210, 1216 (10th Cir. 2002) (McDonnell Douglas applies to ADEA and Title VII claims).

Under the McDonnell Douglas framework, a plaintiff establishes a prima facie case of age discrimination by showing that he or she was: 1) within a protected age group; 2) doing satisfactory work or qualified for the position; 3) discharged; and 4) replaced by a person outside the protected age group. Branson v. Price River Coal Co., 853 F.2d 768, 770 (10th Cir. 1988); EEOC v. Sperry Corp., 852 F.2d 503, 507 (10th Cir. 1988). In RIF cases, a plaintiff is not always replaced with another employee. Thus, courts have modified the fourth element so that a plaintiff may produce "evidence, circumstantial or direct, from which a fact finder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." Branson, 853 F.2d at 771 (internal quotation marks and citation omitted). The fourth element may also be established through circumstantial evidence that a "plaintiff was treated less favorably than younger employees during the [RIF]." Id.

Once a plaintiff establishes a prima facie case, the burden of production shifts to the defendant to show a

legitimate, nondiscriminatory reason for the decision. Sperry, 852 F.2d at 507. If the defendant offers such evidence, "the presumption of discrimination established by the prima facie showing 'simply drops out of the picture.'" Ingels v. Thiokol Corp., 42 F.3d 616, 621 (10th Cir. 1994) (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-11 (1993)). A plaintiff must then offer evidence that age was a determining factor in the challenged decision, by either showing that the defendant's proffered reasons were a pretext for age discrimination or by producing direct evidence of age discrimination. Ingels, 42 F.3d at 621. A plaintiff "need not disprove defendant's reasons or demonstrate that age was the only factor motivating the decision, but [he or she] must show that age actually played a role in the employer's decisionmaking process and had a determinative influence on the decision." Jones v. Unisys Corp., 54 F.3d 624, 632 (10th Cir. 1995) (internal quotation marks, citation and bracket omitted). Evidence of pretext may include: "prior treatment of plaintiff; the employer's policy and practice regarding minority employment (including statistical data); disturbing procedural irregularities (e.g., falsifying or manipulating criteria); and the use of subjective criteria." Garrett, 305 F.3d at 1217 (internal quotation marks and citations omitted).

Level 3 does not dispute that Webb set forth a prima facie case of discrimination. Likewise, Webb does not contest the district court's finding that Level 3 set forth a legitimate nondiscriminatory reason for terminating Webb. The parties, however, dispute whether Webb set forth sufficient evidence that Level 3's reason is a pretext for discrimination.

In RIF cases, a plaintiff can show pretext in three principal ways. Beaird v. Seagate Tech., Inc., 145 F.3d 1159, 1168 (10th Cir. 1998). While most plaintiffs' arguments fit within these three categories, we have not foreclosed other methods of demonstrating pretext. Id. at 1168 n. 6. First, a plaintiff can show that his or her termination does not accord with the criteria allegedly used to select those for the RIF. Id. at 1168. While this "evidence can in some cases suffice to substantiate pretext . . . minor inconsistencies in the application of RIF criteria may be too insubstantial to allow a reasonable jury to infer that the RIF was pretextual." Id. (citations omitted). Second, a plaintiff can produce evidence that his or her evaluation under the defendant's RIF criteria was deliberately falsified or manipulated to effect his or her termination. Id. (citation omitted). Evidence that a supervisor responsible for assessing performance displayed ageist animus is one way of demonstrating manipulation or falsification of an evaluation. Id. Third, a plaintiff can adduce evidence that the RIF was generally pretextual, i.e., that its goal was to eliminate older employees and replace them with new hires. Id. Statistical evidence may be relevant for this purpose. Id.

Webb argues that he presented sufficient evidence from which a jury could have found that his inclusion in the January 2003 RIF was a pretext for age discrimination.

a. Overall age of workforce

Webb argues that, overall, Level 3's workforce was "very young," and from this, he contends a jury may infer that Level 3 had a bias against older workers and discriminated against Webb on the basis of age. He bases this statement on his own observations and on a finding by this court in Abuan v. Level 3

Communications, Inc., that "[t]he workforce at Level 3 was primarily under forty." 353 F.3d 1158, 1165 (10th Cir. 2003).

Level 3's workforce is young. At the time of the January 2003 RIF, the company's workforce, including those affected by the RIF, consisted of 1,694 employees under forty years of age and 666 employees forty years old and over. This fact alone, however, is not evidence of pretext.

While "statistical data showing an employer's pattern of conduct toward a protected class can create an inference that an employer discriminated against individual members of the class," Fallis v. Kerr-McGee Corp., 944 F.2d 743, 746 (10th Cir. 1991) (citation omitted), we have cautioned against its usage. "Statistics taken in isolation are generally not probative of age discrimination." Jones, 54 F.3d at 632 (citation omitted). To create an inference of discrimination, statistical evidence "must show a significant disparity and eliminate nondiscriminatory explanations for the disparity." Fallis, 944 F.2d at 746 (citation omitted). "In other words, a plaintiff's statistical evidence must focus on eliminating nondiscriminatory explanations for the disparate treatment by showing disparate treatment between comparable individuals." Id. (citation and emphasis omitted).

In this case, the fact that Level 3's workforce has a greater number of employees under the age of forty is not evidence of pretext. By considering the overall composition of Level 3's workforce, one effectively groups all employees regardless of specialty or skill, fails to compare similarly situated individuals, and fails to eliminate numerous nondiscriminatory reasons for the fact that Level 3's workforce is young. Accordingly, the overall age of Level 3's workforce,

without more, is insufficient to raise a genuine issue of material fact as to pretext.

b. Webb's beliefs as to his qualifications

As further evidence of pretext, Webb contends he had more experience and was better qualified than other younger employees who received promotions and were not terminated in the RIF. Webb also argues that he performed his job well and received excellent performance evaluations. An employee's own opinions, however, about his or her qualifications do not establish a material factual dispute on the issue of pretext. Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs., 165 F.3d 1321, 1329 (10th Cir. 1999) (citation omitted); see also Furr v. Seagate Tech., Inc., 82 F.3d 980, 988 (10th Cir. 1996) ("It is the manager's perception of the employee's performance that is relevant, not plaintiff's subjective evaluation of his [or her] own relative performance.") (citation omitted).

Webb offers the names of ten individuals whom he contends are younger and less experienced but received promotions. The record contains virtually no evidence as to the specific qualifications of each of these individuals, and the little evidence Webb presented was based on hearsay, vague generalities, and speculation. Webb also failed to identify, with any detail, when these alleged promotions occurred and how these prior incidents are connected to his termination in the January 2003 RIF. See Simms, 165 F.3d at 1330 (recognizing that prior incidences of alleged discrimination are not probative of pretext unless they can be connected to the employment action at issue).

c. Other instances of alleged discrimination

Webb argues that his failure to receive promotions and relocation expenses, as well as his inclusion in the June 2001 RIF, constitute evidence of pretext. This evidence is also insufficient to establish pretext.

Webb has failed to present any evidence connecting these prior incidences with Leddy's decision to include him in the January 2003 RIF. See Simms, 165 F.3d at 1330 (prior incidents are not "probative of pretext unless the prior incidences of alleged discrimination can somehow be tied to the employment actions disputed in the case at hand") (citations omitted). While a plaintiff can connect prior incidences of discrimination by showing that the same supervisors were involved in the prior discriminatory employment actions, Heno v. Sprint/United Mgmt. Co., 208 F.3d 847, 856 (10th Cir. 2000) (citation omitted), Webb is unable to make such a showing. Between 1999 and 2003, Webb worked in two different departments and had numerous different supervisors. Though Leddy made the decision to terminate Webb, Leddy did not make the decision to deny him relocation benefits, deny him promotions, or include him in the June 2001 RIF. Rather, Leddy saved Webb from termination in June 2001 by giving him a position in the Customer Operations Department. There is nothing in the record to connect these alleged prior events to his 2003 termination.

The prior alleged incidences of discrimination are also too remote in time to be considered when determining whether the reasons given for Webb's 2003 RIF termination were pretexual. Discriminatory incidents which allegedly occurred "either several years before the contested action or anytime after are 'not sufficiently connected to the employment action in

question to demonstrate pretext.'" Id. (quoting Simms, 165 F.3d at 1331 (holding that discriminatory event which took place three years before was too remote)). Here, Webb relocated to Colorado in August 2000. Before he relocated, Level 3 informed Webb that relocation expenses were not available. Viewing the evidence in a light most favorable to Webb, the denial of relocation expenses occurred in August 2000 at the latest, nearly two and one-half years before his termination in January 2003. Likewise, the first RIF occurred in June 2001, over one and one-half years before his ultimate termination. These events are too remote in time to establish evidence of pretext. See Heno, 208 F.3d at 856; Simms, 165 F.3d at 1331. As to the alleged promotions of younger employees, the record is devoid of sufficient details to determine when the promotions of his peers occurred, and thus, we are unable to conclude that those instances are evidence of pretext.

Webb also contends that his failure to receive retirement benefits and his unsuccessful attempts to apply for other positions at Level 3 are evidence of pretext. These actions, however, occurred subsequent to his termination, and thus, are not sufficiently connected to his termination to demonstrate pretext. See id.

d. Webb's meeting with human resources

Webb argues that Level 3's failure to conduct an investigation into his statement regarding age discrimination is evidence of pretext. Webb testified, however, that he did not intend to raise allegations of discrimination during the meeting with human resources, did not expect Level 3 to conduct an investigation after the meeting, never filed a formal

internal complaint regarding this allegation, and never followed up on his allegation in any way. This meeting, without more, is simply not evidence of discrimination.

e. January 2003 RIF

Webb contends that his inclusion in the RIF was pretextual because: 1) he did not fit within the criteria for layoff and was the only Program Manager selected for termination;[1] 2) Level 3 used subjective criteria; 3) Level 3 did not include younger employees in the layoff; and 4) Level 3 reassigned his duties to a younger employee.

Webb contends that Kevin O'Hara, President of Level 3, announced in a conference call that the selection criteria for the RIF were: performance, skills and qualifications, and tenure with the company. Webb argues that Level 3 did not follow these criteria because a Human Resources representative, Rob Zwolfer, told him that his position simply had been eliminated. Webb asserts that the elimination of his position contradicts the use of these criteria because "he had more seniority, more experience and superior contributions as compared to his peers." Appellant Br. at 13; App. at 222.

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[1] Factually, Webb's allegation is not entirely accurate. Webb was one of seven individuals who held the position of Program Manager II. Of the seven, four were under the age of forty, and three were over forty years of age. Webb was the only Program Manager II to be eliminated. Webb, however, has attempted to include Program Managers as comparables, but the two positions, Program Manager and Program Manager II, are different.

Webb's beliefs that he had more seniority, more experience, and superior contributions when compared to his peers is insufficient to prove pretext. See Simms, 165 F.3d at 1329 (an employee's own opinions about his or her qualifications do not give rise to a material factual dispute on the issue of pretext); Rea v. Martin Marietta Corp., 29 F.3d 1450, 1456 (10th Cir. 1994) ("Plaintiff's evidence of [his or] her satisfactory work performance is not probative because in a [RIF] case, someone has to be let go, . . . including satisfactory employees.") (internal quotation marks and citation omitted). Moreover, Webb has failed to provide any specific facts for this conclusory statement. There is virtually no evidence in the record, aside from vague generalities and speculation, as to the qualifications of Webb's peers.

As to Webb's allegation of subjective decisionmaking, generally courts view subjective evaluation methods with skepticism. Garrett, 305 F.3d at 1218 (citations omitted). However, "the use of subjective criteria does not suffice to prove intentional discrimination." Doan v. Seagate Tech., Inc., 82 F.3d 974, 978 (10th Cir. 1996) (citation omitted); see also Bauer v. Bailar, 647 F.2d 1037, 1046 (10th Cir. 1981) ("Subjective considerations are not unlawful per se. . . . An employer has discretion to choose among equally qualified candidates, provided that the decision is not based upon unlawful criteria.") (internal quotation marks and citation omitted). "[W]e typically infer pretext . . . only when the criteria on which the employers ultimately rely are entirely subjective in nature." Jones v. Barnhart, 349 F.3d 1260, 1267-68 (10th Cir. 2003) (citations omitted).

While Level 3's criteria involved some subjective considerations, Webb has not shown that Leddy's

decision was based entirely upon subjective criteria. Rather, the evidence indicates that Leddy considered both objective and subjective criteria. Leddy had to reduce the head count within his division and made the ultimate decision to terminate Webb. He selected Webb based on customers, work, sales, and input received from his supervisor, Davetta Garcia, regarding Webb's performance and ability to contribute to the organization. Customers, work, and sales are objective factors. Garcia, too, employed some objective factors in her evaluations, ranking employees based on the number of accounts the employee worked with, the employee's performance and job evaluations, whether the individual was a team player, and the additional benefits the individual contributed to her group. While Garcia's ranking included both objective and subjective considerations, there is no evidence in the record that Webb scored higher on the objective factors (e.g., number of accounts and evaluations) than his younger coworkers. It is not our role to re-compare the qualifications of these employees to determine whether some other employee may have satisfied more RIF criteria than Webb. "Our role is to prevent unlawful hiring practices, not to act as a super personnel department that second guesses employers' business judgments." Simms, 165 F.3d at 1330 (internal quotation marks and citation omitted); see also Doan, 82 F.3d at 978 ("[T]he manner in which a company chooses to conduct a RIF is within the company's sound business discretion . . . .").

Webb also contends that younger employees were not included in the RIF. Webb's allegation is factually incorrect. It is undisputed that of the forty-nine employees included in the RIF, twenty-five were under

the age of forty, and twenty-four were forty years old and over.

Last, Webb disputes the fact that his position was eliminated because, he contends, his responsibilities were still performed after the layoff. In a RIF case, a plaintiff may show pretext by presenting evidence that his job was not eliminated. Abuan, 353 F.3d at 1169. "[T]he test for position elimination [, however,] is not whether the responsibilities were still performed, but rather whether the responsibilities still constituted a single, distinct position." Furr, 82 F.3d at 988. Thus the fact that Webb's responsibilities existed after the layoff is not evidence of discrimination. Webb contends that a younger employee, Jayson Pearce, assumed his duties after his termination. This, however, is factually incorrect. Pearce assumed Webb's responsibilities when Webb left his position as Senior Network Developer in the Network Development Department in 2001 to became a Program Manager in the Customer Operations Department. Pearce did not assume his responsibilities after the January 2003 RIF. The district court found that Webb presented evidence that his job duties were divided among other employees. While we do not believe the record is quite that clear as to the division of Webb's responsibilities, there is no evidence that his duties continued within a single, distinct position after his termination.

f. Webb's remaining evidence

Webb makes two final arguments regarding pretext: 1) Level 3 initially hired older employees in order to "milk" their expertise; and 2) instead of terminating Webb in June 2001, Level 3 placed him in another position which made him vulnerable to future layoffs. Webb has presented no evidence to support his

conspiracy theory. Both allegations are based purely upon speculation, and speculation is insufficient to raise a genuine issue of material fact as to pretext. See Doan, 82 F.3d at 977 ("Speculation . . . will not suffice for evidence.")

Based on the foregoing, Webb has failed to present sufficient evidence of pretext to preclude summary judgment on his age discrimination claim.

Retaliation claim

The anti-retaliation provision of the ADEA forbids an employer from discriminating against an employee because he or she "has opposed any practice made unlawful" by the statute, or because he or she "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation" under the statute. 29 U.S.C. § 623(d).

ADEA retaliation claims are analyzed under the analytical framework set forth in McDonnell Douglas. Lujan v. Walters, 813 F.2d 1051, 1058 (10th Cir. 1987). Initially, under this framework, the plaintiff must establish a prima facie case. Anderson v. Phillips Petroleum Co., 861 F.2d 631, 634 (10th Cir. 1988) (citation omitted), overruled on other grounds by Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993). The burden then shifts to the employer to offer a legitimate non-retaliatory reason for the adverse action. Id. (citation omitted). Once the employer offers such a reason, the burden shifts back to the plaintiff to raise a genuine dispute of material fact as to whether the employer's proffered reason is pretextual. Id. (citations omitted).

To establish a prima facie case of retaliation, Webb must demonstrate: 1) he availed himself of a protected right under the ADEA, such as opposing an employer's discrimination on the basis of age; 2) he was adversely

affected by an employment decision; and 3) a causal connection between the two actions. MacKenzie v. City and County of Denver, 414 F.3d 1266, 1278-79 (10th Cir. 2005).

Webb contends that Level 3 retaliated against him for discussing his belief with human resources on November 14, 2002, that he had been discriminated against on account of age. Webb argues that we should infer retaliation from the temporal proximity between the protected activity and the adverse action, which in this case amounts to approximately two months. He also contends that his discussion with Leddy following Webb's termination is evidence that Leddy was aware of Webb's prior discussion with Isom.[2]

A causal connection "may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action." Burrus v. United Tel. Co. of Kan., Inc., 683 F.2d 339, 343 (10th Cir. 1982) (citation omitted). "Unless there is very close temporal proximity between the protected activity and the retaliatory conduct, the plaintiff must offer additional evidence to establish causation." O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1253 (10th Cir. 2001)

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[2] According to Webb, after his termination, he and Leddy had a discussion during which Webb expressed certain concerns about his subordinates. Webb contends that "[o]ut of the blue, [Leddy] asked me if I believed that I had been discriminated against." App. at 188. In response, Webb stated that he did not intend to complain about discrimination at this time. Webb now argues that Leddy's question is evidence that Leddy was "well aware" of Webb's prior complaint to Isom. Appellant Br. at 25.

(citation omitted). Temporal proximity of two months between the protected conduct and an adverse employment action may be sufficient to establish a prima facie case of retaliation. See Annett v. Univ. of Kan., 371 F.3d 1233, 1240 (10th Cir. 2004) (concluding that a period of two to three months between the protected activity and the alleged retaliatory action was sufficient to establish causation); Anderson v. Coors Brewing Co., 181 F.3d 1171, 1179 (10th Cir. 1999) (assuming that two months and one week between protected activity and adverse action was sufficient to support a prima facie case of retaliation);[3] Ramirez v. Oklahoma Dep't of Mental Health, 41 F.3d 584, 596 (10th Cir. 1994) (concluding that a one and one-half month period between protected activity and adverse action may establish causation); but see Meiners v. Univ. of Kan., 359 F.3d

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[3] In Coors Brewing Co., however, we did not explicitly find that two months was sufficient:

> For example, we have held that a one and one-half month period between protected activity and adverse action may, by itself, establish causation. . . . By contrast, we have held that a three-month period, standing alone, is insufficient to establish causation. . . . Thus, we find ourselves three weeks short of three months and three weeks past one and one-half months. We need not decide on which side the line should be drawn, however, because assuming two months and one week is sufficient to support a prima facie case of retaliation, Plaintiff cannot prove that Defendant's proffered reason for terminating her was pretextual.

Coors Brewing Co., 181 F.3d at 1179 (internal citations omitted).

1222, 1231 (10th Cir. 2004) (a minimum of two months and one week and a maximum of just under three months between the protected conduct and the adverse action is "probably too far apart . . . to establish causation by temporal proximity alone."). Though we have not definitively held that two months between the protected activity and the adverse action is sufficient in itself to establish causation, on these facts, we assume, as we did in Coors Brewing Co., that two months is sufficient.

While, as a general rule, temporal proximity may be sufficient to establish a causal connection between the protected activity and the adverse action, we still require a plaintiff to show that the individual who took the adverse action against plaintiff also knew of the employee's protected activity. See Williams v. Rice, 983 F.2d 177, 181 (10th Cir. 1993) (holding that a plaintiff must show that the individual who took the adverse action against him or her knew of the employee's protected activity). Here, Webb failed to raise a genuine issue of material fact as to whether Leddy knew of Webb's protected activity, i.e., his statement to Isom concerning discrimination. Webb contends that following his termination, Leddy asked him if he believed he had been subject to discrimination. Webb argues that this statement by Leddy is evidence that Leddy was aware of Webb's prior conversation with Isom in human resources. We disagree. Leddy denies knowing, and Isom denies telling Leddy, about the meeting prior to Webb's termination. Webb did not present any evidence rebutting this testimony. Assuming Leddy made such an inquiry after Webb's termination, we do not believe a reasonable juror could infer, from that statement

alone, that Leddy had knowledge of Webb's prior meeting with Isom.

Alternatively, even if Webb had set forth a prima facie case of retaliation, Webb's claim necessarily fails on the issue of pretext. As previously noted with respect to his discrimination claim, Level 3 set forth a legitimate, non-retaliatory reason for its decision to terminate him -- a RIF -- and Webb failed to present sufficient evidence that Level 3's proffered reason was a pretext for unlawful discrimination or retaliation.

The judgment of the district court is AFFIRMED.

Entered for the Court

Mary Beck Briscoe

Circuit Judge

(2)

No. _____

Supreme Court, U.S.
FILED
051458 APR 24 2006
OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 2005

GEORGE WEBB,

Petitioner,

v.

LEVEL 3 COMMUNICATIONS, LLC,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Marcia S. Krieger

Case No, 03-MK-1995 (MJW)

FILED
UNITED STATES DISTRICT COURT

JAN 11 2005

GREGORY C. LANGHAM
CLERK

GEORGE WEBB,

Plaintiff,

v.

LEVEL 3 COMMUNICATIONS, LLC,

Defendant.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT, DISMISSING THE PLAINTIFF'S CLAIMS, AND DIRECTING THE CLERK OF COURT TO CLOSE THIS CASE

THIS MATTER comes before the Court on the Defendant's Motion for Summary Judgment **(#13).** Having considered the motion, the response, the reply, and the documentary evidence attached thereto, the Court finds and concludes as follows.

I. Jurisdiction

The Plaintiff Mr. Webb, asserts two claims under the Age Discrimination in Employment Act ("ADEA"). The Court therefore has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

II. Issue Presented

The Court must determine whether a trial is required on either of Mr. Webb's ADEA claims.

III. Material Facts

Based upon the evidence submitted, which the Court construes most favorably to Mr. Webb, the Court finds that:

1. Level 3 Communications, LLC ("Level 3") hired Mr. Webb in December 1997 and relocated him to Colorado in 2000.

2. In 2001, Level 3 experienced a reduction in force. It did not terminate Mr. Webb's employment at that time but instead reassigned him to a new position (Program Manager II) in which Mr. Webb felt more vulnerable to a reduction in force. Employees who were younger than Mr. Webb were not reassigned to other positions.

3. In 2003, Level 3 terminated Mr. Webb's employment during a reduction in force. The duties of Mr. Webb's position were divided among the remaining younger employees.

4. At the time of his termination, Mr. Webb was age 60.

5. Out of eight persons working as a Program Manager II, Mr. Webb was the only one terminated during the 2003 reduction in force. The other seven ranged in age from 30 to 44.

6. Tim Leddy, who was Vice President of

Customer Operations in charge of Account Consultants and Program Managers for Level 3, made the decision to include Mr. Webb in the 2003 reduction in force.

7. In making his decision, Mr. Leddy considered input from Mr. Webb's direct supervisor, Davetta Garcia.

8. Ms. Garcia ranked her employees as part of the 2003 reduction in force, considering how many accounts each employee was involved with, performance and job evaluations, whether the employee was a "player," and additional benefits contributed by each employee to her group.

9. According to Mr. Webb's affidavit, the criteria utilized by Level 3 during the 2003 reduction in force were: (1) performance; (2) skills and qualifications; and (3) tenure.

10. In his 1999 performance evaluation, Mr. Webb received high marks (3's and 4's) and was found by his supervisor to have "exceeded expectations." This was an improvement from his 1998 performance evaluation in which his marks were lower (mostly 2's).

11. Mr. Webb considered himself to be more experienced and qualified than the younger employees retained by Level 3 after the 2003 reduction in force.

12. There is no evidence that Mr. Leddy decided to include Mr. Webb in the 2003 reduction in force because of his age. In his deposition, Mr. Webb stated that there was nothing Mr. Leddy said or did to make him believe that Mr. Leddy had considered Mr. Webb's age.

13. Approximately two months prior to his

termination, Mr. Webb met with Blake Isom, who was the Human Resources Manager. The purpose of the meeting was to assist Mr. Webb in finding a better way to apply his skills at Level 3. During the meeting, Mr. Isom asked Mr. Webb if he believed he had been discriminated against, and Mr. Webb responded that "a case could probably be made for it." Mr. Webb told Mr. Isom that he felt mistreated by a company dominated by younger males and made the observation that most of his younger peers had been promoted when he had not.

14. There is no evidence that Mr. Webb's statement to Mr. Isom was reported to Mr. Leddy.

15. When Mr. Webb relocated to Colorado, Level 3 initially promised to pay his relocation expenses. However, it withdrew that promise before Mr. Webb made the move, claiming there was no money in the budget for that purpose. It did pay relocation expenses for Derek Wilk and Luke Crabtree, both of whom are younger than Mr. Webb and were promoted to director positions upon relocation.

16. Mr. Webb viewed the Level 3 workforce as "young."

17. After his termination, Mr. Webb applied for other positions at Level 3 and was not granted any interviews.

18. After his termination, Mr. Webb applied for retirement benefits in May 2003 but Level 3 did not process his application.[1]

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[1] Although Mr. Webb initially requested retirement benefits in April 2003, Level 3 could not respond directly to his request because both he and Level 3 are represented by counsel in connection with this case. Through his counsel, Mr. Webb renewed the request for retirement

IV. Standard of Review

Determination of claims or defenses on their merits without a trial is governed by Rule 56 of the Federal Rules of Civil Procedure, which facilitates the entry of a judgment if no trial is necessary. *See White v. York Intern. Corp.*, 45 F.3d 357,360 (10th Cir. 1995). Rule 56 authorizes summary adjudication when there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law. Fed, R. Civ. P. 56(c). Substantive law determines the material facts and issues. It specifies the elements that must be proved for a given claim or defense, sets the standard of proof and identifies the party with the burden of proof. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Kaiser-Francis Oil Co. v. Producers Gas Co.*, 870 F.2d 563, 565 (10th Cir. 1989). A factual dispute is "genuine" and summary judgment is precluded if the evidence presented in support of and opposition to the motion is so contradictory that, if presented at trial, a judgment could enter for either party. *Anderson*, 477 U.S. at 248. When considering a summary judgment motion, a court views all evidence in the light most favorable to the non-moving party, thereby favoring the right to a trial. *Garrett v. Hewlett Packard Co.*, 305 F.3d 1210, 1213 (10th Cir. 2002).

If the movant has the burden of proof on a claim or defense, the movant must establish every element of its claim or defense by sufficient, competent evidence. *See* Fed. R. Civ. P. 56(e). Once the moving party has met its burden, to avoid summary judgment the responding party must present sufficient, competent, contradictory evidence to

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benefits in May 2003.

establish a genuine factual dispute. *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cit. 1991); *Perry v. Woodward*, 199 F.3d 1126, 1131 (10th Cir. 1999).

If the moving party does not have the burden of proof at trial, it must point to an absence of evidence in the record to support the claim or defense which the other party is obligated to prove. If the respondent fails to produce sufficient competent evidence to establish its claim or defense, the claim or defense must be dismissed. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

V. Analysis

A. Age Discrimination

Mr. Webb claims that Level 3 terminated his employment because of his age. To establish a *prima facie* case of discrimination on the basis of age, Mr. Webb must produce evidence that:

(1) He was within the protected age group;

(2) He was doing satisfactory work;

(3) He was discharged; and

(4) He was treated less favorably than younger employees during the reduction in force.

See Rivera v. City and County of Denver, 365 F.3d 912,920 (10th Cir. 2004); *Branson v. Price River Coal Co.*, 853 F.2d 768, 771 (10th Cir. 1988). If Mr. Webb presents evidence of a *prima facie* case, the burden shifts to Level 3 to articulate a legitimate, non-discriminatory reason for the adverse employment action. *See Rivera*, 365 F.3d at 920; *see also*

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). If Level 3 sets forth such a reason, then the burden shifts back to Mr. Webb to produce evidence that Level 3's reason is pretextual. *See Jones v. Unisys Corp.*, 54 F.3d 624 630 (10th Cir. 1995). To demonstrate pretext, Mr. Webb's evidence must show either that Level 3's decision was more likely motivated by discrimination or that Level 3's reason is unworthy of credence. *See id.* at 632.

Level 3 challenges Mr. Webb's ability to establish that Level 3 intended to discriminate against Mr. Webb in deciding to terminate his employment. Level 3 characterizes this as the fourth element of a *prima facie* claim, but in the context of this case, it actually pertains to pretext. Level 3 does not challenge Mr. Webb's ability to establish that he is in a protected age group, that he was doing satisfactory work, that he was discharged, or that younger employees were retained during the 2003 reduction in force.

Assuming that Mr. Webb can establish a *prima facie* claim of discrimination, Level 3 has produced evidence in support of a nondiscriminatory reason for Mr. Webb's termination — a reduction in force. Mr. Webb must therefore show that this reason is pretextual.

In a reduction in force case, an employee can generally establish pretext in one of three ways. *See Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159, 1168 (10th Cir. 1998). First, he can show that his termination does not comport with the criteria employed during the reduction in force. Second, he can produce evidence that his evaluation under the reduction in force criteria was falsified or manipulated, or that the supervisor who made the decision to include him in the reduction in force displayed ageist animus. Third, he can produce evidence that the reduction in force was generally pretextual, *i.e.*, that its goal was to

eliminate older employees and replace them with new hires. However, these three methods of establishing pretext do not foreclose others. *See Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1140 (10th Cir. 2000).

Mr. Webb argues that the criteria used during the reduction in force were subjective and that he is entitled to an inference of discrimination. The use of subjective factors may result in an inference of discrimination for purposes of establishing a *prima facie* case, but it does not constitute discrimination *per se*. *See Pitre v. Western Electric Co., Inc.*, 843 F.2d 1262, 1271-72 (10th Cir. 1988). Thus, Mr. Webb must do more to establish pretext.

Mr. Webb offers evidence that the Level 3 workforce was young. However, Mr. Webb's age in relation to the age of others retained by Level 3 is not, by itself, evidence of pretext. Under the ADEA, age is a neutral factor — employers cannot accord preferential treatment to employees because of their age. *See Branson*, 853 F.2d at 772. Thus, Mr. Webb must show that the likely reason for his inclusion in the reduction in force was his age.

Mr. Webb identifies three criteria used by Level 3 during the 2003 reduction in force: (1) performance; (2) skills and qualifications; and (3) tenure. He offers evidence that his performance level as of 1999 was high and that he believed himself to be more qualified than the younger employees retained by Level 3. However, he offers no evidence concerning the performance of the employees who were retained during the reduction in force or their skills and qualifications. Moreover, Mr. Webb's opinion that he was more qualified than the younger employees retained by Level 3 is not evidence of pretext because it is the employer's perception of the employee's qualifications — not the employee's — which matters. *See id.*

Mr. Webb also offers evidence of several instances in which he perceives that younger employees were treated more favorably than he was prior to his termination. He points to his non-receipt of a relocation package in 2000, his 2001 job reassignment, and the promotion of younger employees. However, he offers no evidence to connect these prior instances of alleged discrimination with Mr. Leddy's decision to include him in the reduction in force. While such alleged discrimination might have led to independent claims not asserted in this action, they do not show discrimination by Mr. Leddy, the decisionmaker with regard to the 2003 reduction in force.

Mr. Webb also offers evidence of alleged discrimination after his termination. He contends that after his termination, he applied for positions with Level 3 but was not granted any interviews. He also contends that Level 3 has not processed his May 2003 application for retirement benefits. Again, he offers no evidence to connect these subsequent instances of alleged discrimination with Mr. Leddy's prior decision to include him in the reduction in force. He also offers no evidence regarding the individuals who were selected for interviews or offered the positions. Assuming that these alleged instances of post-termination discrimination could give rise to independent claims, they do not show discrimination by Mr. Leddy.

In the context of a reduction in force, a terminated employee may show pretext by presenting evidence that his job was not eliminated and that his position — as a single, distinct position — was assumed by a younger employee. *See Abuan v. Level 3 Communications, Inc.*, 353 F.3d 1158, 1169 (10th Cir. 2003). Mr. Webb has presented evidence that his job duties were divided among younger employees. Thus, he contends that his job was not eliminated. His evidence, however, does not show that a single, distinct position

remained after his termination.

Mr. Webb has offered no evidence that Mr. Leddy's decision to include him in the reduction in force was likely motivated by discrimination. Rather, his evidence is to the contrary. In his deposition, Mr. Webb conceded that there was nothing Mr. Leddy did or said to make Mr. Webb believe that Mr. Leddy had considered Mr. Webb's age. Thus, no reasonable jury could conclude that Mr. Webb's employment was terminated for any reason apart from a reduction in force.

B. Retaliation

Mr. Webb claims that Level 3 terminated his employment because he complained about age discrimination to Mr. Isom To establish a *prima facie* case of retaliation, Mr. Webb must produce evidence that:

(1) He engaged in a protected activity;
(2) Level 3 took an adverse employment action against him; and
(3) There is a causal connection between the protected activity and the adverse employment action.

See Stover v. Martinez, 382 F.3d 1064, 1071(10th Cir. 2004). If Mr. Webb presents evidence of a *prima facie* case, the *McDonnell Douglas* burden-shifting analysis applies. *See id.*

Level 3 challenges Mr. Webb's ability to establish the first and third elements of a *prima facie* case — that he engaged in protected opposition to discrimination and that there is a causal connection between a protected activity and Mr. Webb's termination. Even assuming that Mr. Webb's conversation with Mr. Isom qualifies as protected opposition

to discrimination, Mr. Webb has offered no evidence as to a causal connection — that Mr. Leddy knew about the conversation and decided to include Mr. Webb in the reduction in force because of it. Thus, Mr. Webb has not produced sufficient evidence in support of a *prima facie* claim of retaliation.

Even if Mr. Webb had produced sufficient evidence in support of a *prima facie* claim, Level 3 has produced evidence in support of a nondiscriminatory reason for Mr. Webb's termination — that Level 3 terminated his employment as part of a reduction in force. As discussed *supra,* Mr. Webb has not offered sufficient evidence from which a reasonable jury could conclude that Level 3's reason is pretextual.

IT IS THEREFORE ORDERED that the Defendant's Motion for Summary Judgment **(#13)** is **GRANTED**. The Plaintiffs claims are **DISMISSED,** with prejudice, and the Clerk of Court is directed to close this case.

Dated this 11th of January, 2005.

BY THE COURT:

s/Marcia S. Krieger
Marcia S. Krieger
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Marcia S. Krieger

Case No, 03-MK-1995 (MJW)

GEORGE WEBB,

Plaintiff,

v.

LEVEL 3 COMMUNICATIONS, LLC,

Defendant.

FILED
UNITED STATES DISTRICT COURT
JAN 14 2005

GREGORY C. LANGHAM
CLERK

JUDGMENT

On January 11, 2005, the Court dismissed the Plaintiff's claims against the Defendant and directed the Clerk of Court to close this case, Based thereon,

IT IS ORDERED that judgment is entered in favor of the Defendant and against the Plaintiff.

IT IS FURTHER ORDERED that the Defendant shall have its costs upon the filing of a Bill of Costs with the

Clerk of Court within 10 days of entry of this judgment.
Dated this 13th day of January, 2005.

BY THE COURT:
Marcia S. Krieger
United States District Judge

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(3)

No. 05-1458

IN THE

Supreme Court of the United States

GEORGE WEBB

Petitioner,

v.

LEVEL 3 COMMUNICATIONS, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Although the Tenth Circuit Court of Appeals correctly stated the summary judgment standard in its unpublished Order and Judgment in this case, did the court misapply the standard by not properly taking into account:

   a. Petitioner, George Webb's ("Webb") views of his own qualifications as compared with his views of other employees of Respondent, Level 3 Communications, LLC ("Level 3");

   b. Webb's argument with respect to the criteria used by Level 3 in selecting Webb to be laid off as part of a reduction in force ("RIF");

   c. Prior employment events that occurred approximately a year and a half before Webb was laid off; and

   d. Events that occurred after Webb was laid off?

(This restates Nos. 1, 2, 3, 4, and 9 of Webb's Questions Presented.)

2. Did the court misapply the correctly stated summary judgment standard by:

   a. Not considering Webb's evidence as a whole;

   b. Not drawing all reasonable inferences from the evidence in Webb's favor;

c. Explicitly or implicitly determining issues of credibility; and

d. Not conducting a "sensitive inquiry" as to Webb's discrimination claim?

(This restates Nos. 5, 6, 7, and 8 of Webb's Questions Presented.)

3. Did the court misapply the correctly stated summary judgment standard when it held that Webb had not established a prima facie case of retaliation because he had not shown any causal connection between the protected activity and the adverse employment action?

(This restates No. 10 of Webb's Questions Presented.)

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Level 3 Communications, LLC's parent company is Level 3 Communications, Inc.

Because Level 3 Communications, LLC is a limited liability company, it does not have any stock. Level 3 Communications, Inc. is the only publicly held company that holds an ownership interest of 10 percent or more in Level 3 Communications, LLC.

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INTRODUCTION

Supreme Court Rule 10 provides: "A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10. This is the only type of error Webb asserts in his Petition for a Writ of Certiorari ("Petition"). Although Webb identifies 10 "Questions Presented," each is based on a single underlying argument: that the Tenth Circuit, in affirming the grant of summary judgment against Webb and in favor of Level 3, misapplied the summary judgment standard by giving too little, or too much, probative value to certain purported "facts." (*See* Pet. at ii-iii; 11-12.) Accordingly, the questions presented in the Petition are not appropriate for certiorari review.

In addition, none of the reasons given in Rule 10 for granting review applies to the questions presented in the Petition. Webb makes no attempt to argue that the Tenth Circuit's decision conflicts with a decision "of another United States court of appeals on the same important matter," or "by a state court of last resort. . . ." Sup. Ct. R. 10(a). Similarly, although Webb claims to discern a "trend" among federal courts "to limit discrimination plaintiffs' rights to present circumstantial evidence in opposition to motions for summary judgment" (Pet. at 16), Webb does not contend – even looking at the Tenth Circuit's decision through his own, distorted prism – that in this case the court "so far departed from the accepted and usual course of judicial proceedings" as to require "an exercise of this Court's supervisory power. . . ." Sup. Ct. R. 10. Thus, Webb also fails to advance any reason why, under the guidelines delineated in Rule 10, the Petition should be granted.

Moreover, the overarching claim of error by Webb – that the Tenth Circuit in this case subverted the correct summary judgment standard – is simply wrong. Despite his professed obeisance to this Court's description of the proper standard for summary judgment, Webb never examines, quotes, or cites, Rule 56 or any of the Court's trilogy of seminal summary judgment decisions: *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Had he done so, he would have been forced to

acknowledge that the Tenth Circuit's decision is entirely consistent with Rule 56 and *Celotex*, *Anderson*, and *Matsushita*. Thus, Webb's argument is not really – as he pretends – that courts of appeals are not correctly applying the proper summary judgment standard. It is that the proper summary judgment standard imposed a burden he was unable to meet.

Further, Webb distorts the record in this case, and the Tenth Circuit's rulings based on the record. In truth, the reason the district court granted summary judgment, and the court of appeals affirmed that decision, is not because those courts misapplied the correct summary judgment standard. It is because Webb was unable to produce sufficient evidence (because no evidence existed) that would have allowed a jury to find that the proffered reason Webb was laid off was pretextual. Thus, although Webb pretends that he was deprived of his claims due to judicial error, in reality Webb's claims were dismissed because of a failure of proof.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

In late 1997, Webb was hired as a Senior Network Developer by a predecessor of Level 3. At the time Webb was hired, he was 55 years old. Webb initially worked for Level 3's predecessor in California, but relocated to Colorado in August 2000. Between January 1998 and June 2001, Webb had at least four supervisors. Webb testified in deposition that he suffered no disparate treatment from any of them because of his age.[1]

In June 2001, Level 3 went through the first of a series of reductions in force ("RIF"), and Webb was notified that "[his] employment or [his] position was being eliminated, and that [he] would no longer have a job effective . . . September 9th

1. Although Webb did not bring a claim of gender discrimination, he opined that an early supervisor, Elsa Svensson ("Svensson"), discriminated against him based on gender. But Webb had no **evidence** of discrimination; his allegation was due to the fact that he "felt that since [he] was the only male working for her . . . [he] might be held to a different standard." In fact, Webb testified that Svensson did not treat Webb differently than his coworkers because of his age.

[2001]."[2] Webb ultimately was not laid off, however, because he was transferred to Level 3's Customer Operations department as a "program manager". The transfer, by Webb's own admission, was a lateral transfer. Webb testified that he did not experience any discrimination while working in the Customer Operations department. In fact, although Level 3 went through several additional RIFs between June 2001 and January 2003, Webb survived all of them.

After working in the Customer Operations department for more than a year, Webb concluded that his position did not fully utilize his abilities. On November 14, 2002, Webb met with a representative in Level 3's Human Resources department ("HR") named Blake Isom ("Isom"). The sole reason for the meeting was that Webb wanted to seek "assistance from HR in finding opportunities that could better utilize [his] experience and expertise. . . ." During the meeting, Isom asked Webb, "Have you ever been discriminated against [at Level 3]?" In his deposition, Webb said that he "believe[d]" he told Isom that "a case could probably be made for it." Webb, however, neither intended nor expected Isom to conduct an age discrimination investigation. Isom likewise did not understand that Webb was claiming age discrimination, or that Isom should undertake an investigation on behalf of Webb. Isom did not take any action or discuss his conversation with Webb "with any managers or employees in Customer Operations. . . ."

On January 16, 2003, more than two months after Webb met with Isom, Level 3 went through another RIF. Forty-nine employees – 25 who were under the age of 40 and 24 who were 40 years or older – were laid off. Webb was among the employees

2. Webb stated (after filing the first of his lawsuits against Level 3) that his inclusion in the June 2001 RIF was "the first time that [he] started feeling like age might be impacting [his] employment in any way." Webb had no basis for his "feeling," which is contrary to the facts. At the time of the June 2001 RIF, Level 3 employed two Senior Network Developers: Webb and a female employee in her mid-30s. Webb was able to transfer to a lateral position in another department, but the employee in her 30s was not, and was laid off. Further, Webb's implication – that the person who included him in the June 2001 RIF might have discriminated against him – rings hollow in light of the fact that Webb could not even identify that person.

who were laid off. The person who decided to include Webb in the 2003 RIF was Tim Leddy ("Leddy"), the same person who, a year and five months earlier, had decided to hire Webb to work in the Customer Operations department. Leddy – who was himself 45 years old at the time of the RIF – submitted an affidavit stating that he did not know Webb's age in making the decision to place Webb "among the individuals [Leddy] decided to include in the RIF." Likewise, Leddy did not know about "Webb's alleged complaints regarding his employment (specifically, that he claims he was treated unlawfully because of his age). In fact, [Leddy] was unaware that [Webb] had even talked to Human Resources regarding any workplace issues."

When the January 2003 RIF was announced, Webb was offered the choice of a severance package or a retirement package. The retirement package option expired in 45 days, and Webb decided not to accept it. Thirty-seven days after the retirement option expired, Webb changed his mind and submitted to HR a "formal request to retire from Level 3. . . ." Because Webb had "retained legal counsel with regard to [his] claims concerning [his] separation from employment," HR referred Webb's request to Level 3's legal department. Thereafter, Webb's request for retirement benefits was denied because it was untimely.

After Webb was laid off, he applied for several jobs at Level 3 – including a job for the position of Program Manager – but he did not receive an interview. Although Webb has brought a separate EEOC Charge – and a second age discrimination lawsuit which is currently pending in federal court, *see Webb v. Level 3 Commc'ns, L.L.C.*, No. 05-cv-773-RPM-BNB (D. Colo. filed Apr. 27, 2005) – based on Level 3's post-termination failure to hire him, Webb also alleged in this case that the failure to hire showed that his inclusion in the RIF was based on discrimination.

II. PROCEDURAL HISTORY

On October 7, 2003, Webb filed a lawsuit against Level 3 in the United States District Court for the District of Colorado against Level 3. Webb alleged claims for discrimination and retaliation in violation of the Age Discrimination in Employment

Act, 29 U.S.C. §§ 621-34 (2006) ("ADEA"). On April 1, 2004, Level 3 moved for summary judgment on Webb's claims.

On January 11, 2005, the district court granted Level 3's motion. The court found that although Webb had established a prima facie case of age discrimination, Level 3 had produced a legitimate, non-discriminatory reason for Webb's discharge – a RIF – and "no reasonable jury could conclude that Mr. Webb's employment was terminated for any reason apart from a reduction in force." (Supp. App. at 30a.) The court also found that (a) Webb had failed to establish a prima facie case of retaliation because he had "offered no evidence as to a causal connection" between the protected action and the adverse employment action (*id.* at 31a); and (b) even if Webb had presented a prima facie case of retaliation, Level 3 had produced evidence of a nondiscriminatory reason for Webb's termination and Webb had "not offered sufficient evidence from which a reasonable jury could conclude that Level 3's reason is pretextual." (*Id.*)

Webb appealed. On January 25, 2006, the United States Court of Appeals for the Tenth Circuit affirmed the district court's grant of summary judgment.

III. FACTUAL ERRORS IN THE PETITION

Supreme Court Rule 15(2) provides that respondents "have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." Level 3 identifies the following misstatements in the Petition.

1. Webb asserts that Level 3 hired Webb "to tap into his expertise in a certain technical area" (Pet. at 2), and that Webb "was so informed by Level 3. . . ." (*Id.*) Neither assertion is supported by any evidence. (*See* App. at 15a-16a ("Webb [argues that] Level 3 initially hired older employees in order to 'milk' their expertise. . . . Webb has presented no evidence to support his conspiracy theory.").)

2. Webb claims that he "directly observed that the company was made up primarily of males in their 20s and 30s, and the number of employees older than that was in the low single digits. This was an objectively observable fact." (Pet. at 2-3.) Webb's contention is erroneous, and illustrates the fallacy in Webb's

persistent portrayal of subjective opinions as objective facts. Although Level 3's workforce (like that of many telecommunications companies at the time) was comparatively young, Webb's claim that he "directly observed" that the percentage of employees 40 or older was "in the low single digits" is an egregious exaggeration. At the time of the January 2003 RIF, 28.2 percent of Level 3's workforce was 40 or older. (App. at 8a.)

3. Webb claims that in *Abuan v. Level (3) Communications, Inc.*, 353 F.3d 1158, 1165 (10th Cir. 2003), a jury finding of age discrimination "was upheld upon evidence of a young work force with little senior oversight." (Pet. at 2.) Webb mischaracterizes the basis on which the court upheld the jury verdict in *Abuan*. In *Abuan* – which, unlike this case, did not involve a RIF but involved the demotion of an employee during a time when Level 3 was "actively recruiting new employees," 353 F.3d at 1169 – the court's evaluation of the sufficiency of the evidence did not rely on, discuss, or even mention the age of the workforce. *See id.* at 1168-70.[3]

4. Webb asserts that he learned that the RIF criteria that Level 3 announced "were not applied to him at all." (Pet. at 3.) "Instead," Webb argues, "a human resources manager informed plaintiff that he had been terminated because his position had been eliminated. This directly contradicted the announced RIF criteria." (*Id.*) There is no inconsistency between the announced RIF criteria and a statement that Webb's position had been eliminated. In the January 2003 RIF, one Program Manager II position – Webb's – was eliminated. The selection of Webb's position (as opposed to another employee's Program Manager II position) was based on specified RIF criteria. In fact, Level 3's application of its RIF criteria was examined at length by the Tenth Circuit. Webb's attempt to create a contradiction fails. (*See* App. at 12-14a.)

5. Webb argues that he was the only Program Manager II older than 45 years of age who was included in the RIF. (Pet. at 3.) Webb's use of the "45 years old" cutoff is misleading. The

3. In its discussion of the facts, the court repeated testimony that Level 3's workforce was young. That testimony was not relied on in evaluating the sufficiency of the evidence. *Id.* at 1165.

ADEA protects individuals who are 40 years of age and older; and four of the eight employees (including Webb) with the title of Program Manager II were 40 years of age or older.[4]

6. Webb claims that several employees under the age of 40 with whom Webb had worked, and whom he had "directly observed" were not laid off even though they had not worked for Level 3 as long as Webb had. (*Id.* at 3-4.) The Tenth Circuit found that Webb "failed to provide any specific facts" supporting his belief that he had more seniority and experience, and made superior contributions, than his peers. (App. at 13a.) The court stated: "There is virtually no evidence in the record, aside from vague generalities and speculation, as to the qualifications of Webb's peers." (*Id.*) Further, Webb never attempted to show that the individuals to whom he is referring in this cryptic statement were comparators.

7. Webb asserts that "[w]hile working at the company, [Webb's] formal performance evaluations were excellent, i.e. 'at or above' expectations." (Pet. at 4.) Webb's evaluations were generally, but not uniformly, favorable. (Supp. App. at 23a (Fact No. 10).) Further, Webb provides no evidence comparing his evaluations to those of other employees.

8. Webb argues that the favorable reviews he received constitute "strong evidence in a discrimination case. . . ." But "in a RIF a record of positive performance reviews is generally unpersuasive evidence of age bias because 'even capable employees are released when an employer is down-sizing.' " *Brown v. McDonnell Douglas Corp.*, 113 F.3d 139, 142 (8th Cir. 1997) (quoting *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995)); *accord Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1456 (10th Cir. 1994) (quoted at App. at 13a.).[5]

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4. The Tenth Circuit says that "Webb was one of seven individuals who held the position of Program Manager II" and that "four were under the age of forty, and three were over forty years of age." (App. at 12a.) This enumeration does not include Webb himself.

5. In fact, if positive performance evaluations are evidence of anything, they are evidence of no discriminatory animus, since it is unlikely that a company would praise an employee against whom it was prejudiced, just so it could then take discriminatory action against him or her. *See Stidham v. Minn. Mining & Mfg., Inc.*, 399 F.3d 935, 940 (8th Cir. 2005).

9. Webb expresses the belief that his transfer in 2001 from the Network Development department to the Customer Operations department "made him vulnerable to RIF termination." (Pet. at 4.) Webb concedes that this belief is "subjective," but contends that his inclusion in the January 2003 RIF transforms his belief into "an objective fact." (*Id.*) The fact that Webb was included in a RIF after his transfer does not mean he became "more vulnerable" as a result of the transfer. Indeed, the undisputed facts establish just the opposite. If Webb had not transferred to the Customer Operations department, he would have been laid off a year and a half earlier, in the June 2001 RIF. Further, the Tenth Circuit found that Webb had "presented no evidence to support" the argument that his 2001 transfer made him more vulnerable to a subsequent RIF, and that is was "based purely upon speculation, and speculation is insufficient to raise a genuine issue of material fact as to pretext." (App. at 15a-16a.) Still further, even if one were to accept Webb's speculation that his 2001 transfer made him more vulnerable to a RIF in 2003, that fact would not be probative in any way of age discrimination. To make such a causal leap, one would have to assume that when Webb was hired laterally in June 2001, the person who hired him – Leddy – was sufficiently prescient to realize that in a year and a half, (a) Level 3 would have another RIF,[6] (b) the January 2003 RIF would affect the Customer Operations department more heavily than the Network Development department, and (c) Leddy would, at that time, have the opportunity to lay off Webb. If Leddy had such discriminatory animus, it would have been much simpler for him simply not to hire Webb for the lateral position. As this Court emphasized in *Matsushita*, "if the factual context renders [a party's] claim implausible . . . [the party] must come forward with more persuasive evidence to support [his] claim. . . ." 475 U.S. at 587.

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6. Leddy stated in his affidavit that at the time he hired Webb, he had no knowledge about any subsequent layoffs in January 2003. Thus, the undisputed evidence – as well as common sense – demonstrates that Webb was not transferred so that he would be more vulnerable to layoff a year and a half later.

10. Webb asserts that when he was transferred to Customer Operations in 2001, "contrary to routine the company then provided no planning for [his] future career progression, as it did for other, younger employees." (Pet. at 5.) The assertions that Level 3 had a "routine" practice of planning for its employees' "career progression," and that Level 3 planned for the future career progression of its younger employees, are unsupported by the record.

11. Webb states that "Elsa Svensson, in her mid-30s," had "no prior experience in network development and no prior experience as a supervisor, as she readily conceded." (*Id.* at 5.) This statement is unsupported by the record. Webb did not introduce Svensson's "prior experience" into the record, and he did not introduce evidence that Svensson "conceded" a lack of experience.

12. Webb contends that "[n]inety percent of plaintiff's peers," all of whom were under 40, received promotions while Webb did not. (*Id.* at 5-6.) The Tenth Circuit found that Webb's allegations about unfair promotions were unsupported by the record:

> Webb offers the names of ten individuals whom he contends are younger and less experienced but received promotions. The record contains virtually no evidence as to the specific qualifications of each of these individuals, and the little evidence Webb presented was based on hearsay, vague generalities, and speculation. Webb also failed to identify, with any detail, when these promotions occurred and how these prior incidents are connected to his termination in the January 2003 RIF.

(App. at 9a.) Further, Webb testified in deposition that the only basis for his claim of discrimination in promotion was that the people who were promoted to the level of director were younger than he was. Still further, all of the individuals Webb identified worked in Level 3's Network Development department, which Webb left in 2001. As the district court found, Webb "offer[ed] no evidence to connect these prior instances of alleged discrimination with Mr. Leddy's decision to include him in the [RIF]." (Supp. App. at 29a.)

13. Webb states that on November 14, 2002, he went to HR to "register his concerns" about discrimination. (Pet. at 6-7.) This assertion about the reason for Webb's meeting with HR is contradicted by Webb's deposition testimony. Webb testified at deposition that the sole reason for the meeting with HR was that Webb wanted "assistance from HR in finding opportunities that could better utilize [his] experience and expertise. . . ." Webb also states that during this meeting, he expressed the view that Level 3 was "a company dominated by younger males and that the company had a disproportionately low number of older males." (*Id.* at 7.) This assertion is contrary to the record.

14. Webb states that the HR representative "took handwritten notes during plaintiff's discussion about discrimination, but said notes have never been found." (*Id.* at 7.) This is incorrect. The notes were typed up, and the typed notes were identified in Level 3's disclosures and made available for inspection and copying.

15. Webb makes several statements about an employee named Jason Pearce ("Pearce"). (*Id.* at 7-8.) These statements concern the June 2001 RIF, and not the January 2003 RIF when Webb was laid off. (*See* App. 15a.) Webb also attributes statements about Webb's superior experience to Pearce. (*See, e.g.*, Pet. at 8 ("Plaintiff had been Pearce's 'mentor' and 'teacher,' according to Pearce himself.").) Pearce, however, provided no testimony in this case. Thus, Webb's attribution of statements to Pearce either are unsupported by the record, or are based solely on hearsay (statements by Webb about what Pearce purportedly said to Webb).

16. Webb contends that "[t]he sole explanation for the RIF selection of plaintiff was completely subjective." (Pet. at 8.) The court found that Webb, yet again, failed to present evidence supporting his assertion, and that the record showed otherwise. (*See* App. at 13a-14a ("Webb has not shown that Leddy's decision was based entirely upon subjective criteria. Rather the

evidence indicates that Leddy considered both objective and subjective criteria.").)[7]

17. In response to Level 3's motion for summary judgment, Webb presented an affidavit in which he, for the first time, told a story about a meeting with Leddy (after Webb was discharged), in which Leddy "spontaneously asked [Webb] if he thought he had been discriminated against." Webb contends this question raises an issue of pretext. Ignoring the questionable veracity of Webb's fortuitous remembrance, the question is not probative of discrimination by Leddy. *See* Fed. R. Evid. 401. (*See also* App. at 19a ("Assuming Leddy made such an inquiry after Webb's termination, we do not believe a reasonable juror could infer, from that statement alone, that Leddy had knowledge of Webb's prior meeting with Isom.").)[8]

18. Webb claims that although he was offered the option of early retirement, when he attempted to select that option, he was referred to Level 3's legal department "because plaintiff had hired a lawyer." The legal department then denied Webb's request for early retirement. Webb's claim ignores the facts that (a) the option of early retirement – offered to all employees who were subject to the January 2003 RIF – expired 45 days after it was offered, (b) Webb initially declined to apply for the option, and (c) it was only after the option expired that Webb changed his mind and attempted to select the early retirement option. Further, as the Tenth Circuit recognized, because the denial decision occurred after Webb's layoff and was made by a different individual in a different department, it was "not sufficiently connected to his termination to demonstrate pretext." (App. at 11a.)

REASONS FOR DENYING THE PETITION

Webb's Petition should be denied for the following reasons: First, the questions it presents are based on a supposed

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7. Webb also asserts that Leddy's "only pertinent statement of analysis" was that " 'I considered input from Mr. Webb's direct supervisor, Davetta Garcia.' " (Pet. at 8.) In truth, Leddy presented an affidavit to the district court that provided additional detail. Moreover, Webb elected not to take Leddy's deposition.

8. Moreover, Webb fails to mention that in response to this question, he did not claim discrimination.

misapplication by the Tenth Circuit of the correct summary judgment standard, and certiorari review is "rarely granted" based on such an asserted error. Moreover, Webb does not assert that any of the reasons set out in Rule 10 for granting a petition apply here. Second, Webb's assertion that the court of appeals failed to properly apply the correct summary judgment standard is based on (a) Webb's purposeful ignorance of the law governing summary judgment – Webb does not examine, discuss, review, or even cite to any of this Court's trilogy of seminal summary judgment decisions, and he does not discuss, review, or cite to Rule 56 – ; and (b) a blatant mischaracterization of the factual record in this case. If the applicable summary judgment standard is applied to the actual facts, it becomes evident that the court properly applied the summary judgment standard. Accordingly, the Petition advances no reason why certiorari review would be appropriate here.

I. THE PETITION SHOULD BE DENIED BECAUSE THE QUESTIONS IT PRESENTS MERELY ASSERT THAT THE TENTH CIRCUIT MISAPPLIED THE SUMMARY JUDGMENT STANDARD.

In his Petition, Webb does not dispute that the Tenth Circuit delineated the correct summary judgment standard in its opinion. Nor could he; the court expressly quoted the standard set forth in Rule 56. "Summary judgment is appropriate," the court stated, " 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " (App. at 4a (quoting Fed. R. Civ. P. 56(c).) Further, the court articulated the proper perspective for reviewing summary judgment evidence. " 'We view the evidence, and draw reasonable inferences therefrom, in the light most favorable to the nonmoving party.' " (App. at 4a (quoting *Combs v. PriceWaterhouse Coopers LLP*, 382 F.3d 1196, 1199 (10th Cir. 2004) (citation omitted)); *see, e.g., Immigration and Naturalization Serv. v. Abudu*, 485 U.S. 94, 101 (1988) (" 'On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion.' ")

(citing *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). Thus, the Tenth Circuit "properly stated" the "rule of law" applicable to summary judgment motions.

Nonetheless, Webb argues that the Tenth Circuit erred because it misapplied the applicable summary judgment standard. First, Webb asserts, the court gave insufficient credence to evidence, favorable to him, showing (1) inconsistency and subjectivity in the application of RIF criteria; (2) the "young age of the company's workforce;" (3) Webb's personal comparison of himself with younger employees; (4) prior acts against Webb; and (5) post-termination acts against him. (Pet. at 12-13.) Second, Webb contends, the court misapplied the summary judgment standard by ruling that (1) "[t]he decision to terminate [Webb] was in part objective and that defeats a showing of pretext;" and (2) "after [Webb's] termination, his duties were divided up among other employees, and that defeats a showing of pretext." (Pet. at 13.)

Webb mischaracterizes both the "evidence" and the Tenth Circuit's rulings. More significantly for purposes of ruling on the Petition, however, the purported errors claimed by Webb are nothing more than allegations that Rule 56 was misapplied. For instance, Webb criticizes at length the Tenth Circuit's ruling – which is consistent with decisions over more than a decade by other circuit courts of appeal[9] (and with other decisions by the Tenth Circuit) – that Webb's personal beliefs about the superiority of his own qualifications compared to the qualifications of other employees are insufficient to create a genuine issue of material fact as whether the reasons given for including Webb in the RIF were pretextual. But Webb's criticism is simply another way of saying that the court did not properly apply the summary judgment standard because it failed to draw

9. *See, e.g., Curby v. Solutia, Inc.*, 351 F.3d 868, 874 (8th Cir. 2003); *Simms v. Okla. ex rel. Dep't of Mental Health and Substance Abuse Servs.*, 165 F.3d 1321, 1329 (10th Cir. 1999); *Shorette v. Rite Aid of Me., Inc.*, 155 F.3d 8, 15 (1st Cir. 1998); *Ost v. W. Suburban Travelers Limousine, Inc.*, 88 F.3d 435, 441 (7th Cir. 1996); *Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 42 (5th Cir. 1996); *Holt v. KMI-Cont'l, Inc.*, 95 F.3d 123, 129 (2nd Cir. 1996); *Johnson v. U.S. Dep't of Health and Human Servs.*, 30 F.3d 45, 47 (6th Cir. 1994).

all "reasonable inferences" from Webb's characterization of his qualifications. Similarly, Webb criticizes the Tenth Circuit because it supposedly "weighed and discounted" certain unsubstantiated allegations – which Webb incorrectly calls "circumstantial evidence" – including such things as "the background level of a workforce dominated by young people with little senior supervision, a prior reassignment of [Webb] to a job that made him more vulnerable to layoff; [and the] failure thereafter to provide career planning typical for other, younger employees. . . ." (Pet. at 25-26.) Again, however, the court's purported weighing and discounting of this "evidence" implicate nothing more than the way the court applied the correctly articulated summary judgment standard.

The same is true of each of the 10 questions presented by the Petition. Each addresses the correct way for a court to **apply** the standard for summary judgment. The first question asks whether a court should discount an employee's "evidence of his own qualifications and performance . . . as mere opinion." (Pet. at ii.) The second question asks whether it is error for a court to conclude that an employer's "total deviation from announced criteria for [a] reduction in force" was insufficient to prove pretext. (*Id.*) The third asks whether a court misapplies the summary judgment standard if it rules that "prior acts against plaintiff and in favor of others outside the protected class" are not relevant to prove pretext. (*Id.*) The fourth asks whether a court conclusion that "subsequent acts against an employee after termination . . . are relevant to prove pretext" is error. And on and on. Characterized fairly, each question does nothing more than challenge a supposed ruling that, according to Webb, misapplied the correct standard for summary judgment. As such, each assertion of error consists of – at most – the "misapplication of a properly stated rule of law" for which review is "rarely granted." Sup. Ct. R. 10.

II. THE PETITION SHOULD BE DENIED BECAUSE NONE OF THE REASONS SET FORTH IN RULE 10 FOR GRANTING A PETITION APPLIES HERE.

Nor does this case presents one of the "rare" instances that might justify review of a court of appeals' alleged "misapplication of a properly stated rule of law." This is a garden-variety age

discrimination case. It does not raise unusual or complex questions of law, it does not present unsettled issues, it does not require consideration of new or novel analyses, and it does not concern legal questions about which other courts disagree. In fact, this case does not implicate – and Webb does not even attempt to argue that this case implicates – any of the guidelines identified in Rule 10 as "indicat[ing] the character of the reasons the Court considers" in granting certiorari review. Sup. Ct. R. 10.[10]

A. The Tenth Circuit's Decision Does Not Conflict with the Decision of Another United States Court of Appeals on the Same Important Matter, or a Decision by a State Court of Last Resort.

Rule 10 recognizes that certiorari review may be granted where a court of appeals (a) issues a decision that conflicts "with the decision of another United States court of appeals on the same important matter," or (b) decides "an important federal question in a way that conflicts with a decision by a state court of last resort. . . ." Sup. Ct. R. 10. Neither situation exists here. Webb's Petition indisputably does not assert a conflict between the Tenth Circuit's decision in this case, and a decision by a state court in another case. In fact, Webb's Petition does not cite to a single state court decision, conflicting or otherwise.[11]

Likewise, Webb's Petition does not assert a conflict between the decision here and decisions by other court of appeals. Indeed, the opposite is true. Webb argues that the Tenth Circuit is **following** the lead of other appellate courts in supposedly misapplying the proper summary judgment standard. (*See* Pet. at 14-15 (repeated assertion that "an increasing number of courts of appeals" are misapplying the correct standard for summary judgment) (capitalization and emphasis omitted).) Webb identifies several rulings by the court in this case, and then cites consistent decisions over the past 10 years by the Tenth Circuit or other courts of appeals. *See, e.g., id.* at 22 (criticizing Tenth

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10. In his Petition, Webb never once discusses, quotes from, paraphrases, or cites to Rule 10.

11. Because no state court decision is at issue, the guidelines for certiorari review in Rule 10(b) and (c) are also inapposite. *See* Sup. Ct. R. 10(b), (c).

Circuit for "adopt[ing] a rule of law previously created by Seventh Circuit" and citing consistent decision by Eleventh Circuit); *id.* at 24 (describing " 'mere opinion' line of cases from Tenth Circuit and from other circuits" as "a *de facto* variety of [a] new rule of law" in Eighth and Ninth Circuits); *id.* at 17 (citing consistent decisions by Ninth and Eighth Circuits). Thus, Webb does not complain of inconsistent rulings by other appellate courts; he complains of **consistent** rulings by them.

B. The Tenth Circuit's Decision Is Not Such a Departure from the Accepted and Usual Course of Judicial Proceedings as to Require an Exercise of the Court's Supervisory Power.

Under Rule 10, this Court also considers granting certiorari review when a court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power. . . ." Sup. Ct. R. 10. That is not the situation here.[12] The Petition itself demonstrates that the Tenth Circuit's decision is not a dramatic departure from "accepted and usual" decisions by other courts. As noted previously (*see supra* §II.A), the Petition complains that the court's decision in this case is in **accordance** with accepted and usual decisions of other courts, not that it is a far departure from them.

III. WEBB'S ASSERTION THAT THE TENTH CIRCUIT IN THIS CASE FAILED TO FOLLOW ESTABLISHED LAW GOVERNING SUMMARY JUDGMENT MOTIONS IS WITHOUT MERIT.

Rather than attempt to argue that his Petition should be granted because the questions it presents fall within the guidelines identified in Rule 10, Webb apparently believes the Court should grant the Petition because the Tenth Circuit's ruling epitomizes what Webb perceives as a massive groundswell of judicial insubordination by federal courts. According to Webb, the Tenth Circuit in this case (and other federal circuit courts in similar cases), is refusing to follow established precedent by

12. To the extent this guideline is directed toward procedural irregularities, it is inapposite on its face because Webb does not identify any irregularity in the judicial proceedings themselves.

this Court delineating the proper application of Fed. R. Civ. P. 56. As a result, Webb implies, this Court should grant the Petition to quell the judicial insurrection by the Tenth Circuit (and the other courts of appeal).[13]

Webb's view that the Tenth Circuit in this case failed to follow established precedent is legally and factually erroneous. The decision by the court in this case is entirely consistent with Rule 56 and this Court's summary judgment decisions. Accordingly, the Petition presents no reason why certiorari review would be appropriate.

A. This Court Delineated the Correct Summary Judgment Standard in *Celotex*, *Anderson*, and *Matsushita*.

Twenty years ago, this Court issued a trilogy of cases – *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986) – that addressed the purposes of, and standards for, summary judgment. A principal purpose of Fed. R. Civ. P. 56, the Court declared, "is to isolate and dispose of factually unsupported claims or defenses. . . ." *Celotex*, 477 U.S. at 323-24; *see also Matsushita*, 475 U.S. at 587 ("purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial' ") (quoting Fed. R. Civ. P. 56(e) advisory committee's note (1963)). Accordingly, the Court concluded, Rule 56 "should be interpreted in a way that allows it to accomplish this purpose." *Celotex*, 477 U.S. at 324.

The Court then outlined the correct interpretation of Rule 56. A party moving for summary judgment must demonstrate to the district court that " 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

13. Even if the Court were to conclude that courts of appeals have, in certain cases, misapplied the correct summary judgment standard, the Court should still deny the Petition. Regardless what other appellate courts may be doing, in **this** case the Tenth Circuit correctly applied the summary judgment standard. Thus, a grant of certiorari review here, for the purpose of instructing other appellate courts in other appellate cases, would be nothing more than an advisory opinion.

affidavits, if any,' " show that " 'there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' " *Celotex*, 477 U.S. at 322 (quoting Fed. R. Civ. P. 56(c)). When the moving party makes a proper showing, the nonmoving party – if it bears the burden of proof at trial – must "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Id.* at 324.

The obligation of a nonmoving party to show a factual dispute "has two components." *Matsushita*, 475 U.S. at 586. The dispute must be material, and it must be and genuine. *See Anderson*, 477 U.S. at 247-48 (the Rule 56 standard "provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact") (emphasis in original)). A disputed fact is material when it "might affect the outcome of the suit under the governing law. . . ." *Id.* at 248. Thus, "[f]actual disputes that are irrelevant or unnecessary" are not material and "will not be counted." *Id.*

A disputed issue of fact is genuine when it is sufficient to allow a reasonable jury to return a verdict for the nonmoving party. *Id.* at 249. Evidence that "is merely colorable, or is not significantly probative," will not create a genuine issue, and "summary judgment may be granted." *Id.* at 249-50 (citations omitted); *see also Matsushita*, 475 U.S. at 587 ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial*.' ") (citations omitted) (emphasis in original). Likewise, evidence that is based on speculation "does not create a *genuine* issue of fact; instead, it creates a false issue, the demolition of which is a primary goal of summary judgment." *Lexington Ins. Co. v. W. Pa. Hosp.*, 423 F.3d 318 (3d Cir. 2005) (quoting *Hedberg v. Ind. Bell Tel. Co., Inc.*, 47 F.3d 928, 932 (7th Cir. 1995) (emphasis in original)).

Under Rule 56, therefore, judges are not " 'required to submit a question to a jury merely because evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party.' " *Anderson*, 477 U.S. at 251 (citations omitted). Rather, "in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." *Id.*

B. Webb's Claim That the Tenth Circuit's Opinion Is Contrary to *Reeves* Is Without Merit.

As noted previously, although Webb contends that the Tenth Circuit erroneously applied the corrects standard for summary judgment, he does not discuss *Celotex*, *Anderson*, or *Matsushita*. Rather, Webb relies solely on *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), in which this Court evaluated the standard (which is identical to the summary judgment standard) for ruling on a motion for judgment as a matter of law under Fed. R. Civ. P. 50.[14] Webb claims that the Tenth Circuit failed to follow:

> the teaching of *Reeves*, supra, that questions of fact are to be approached the same in discrimination cases as in other cases. *Id.*, at 148. "It therefore follows that, in entertaining a motion for judgment as a matter of law, the court should review *all* of the evidence in the record." *Id.*, at 150. [emphasis added]. ". . . In so doing, however, the court must draw all inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Id.*

(Pet. at 23.)

14. To the extent Webb intends to suggest by his exclusive reliance on *Reeves* that its standard differs from the standard in *Celotex*, *Anderson*, and *Matsushita*, that suggestion is untenable. This Court clearly saw no substantive difference; the Court cited all three of the summary judgment decisions in *Reeves*, and it cited *Anderson* multiple times.

Webb's argument that the Tenth Circuit's decision is contrary to *Reeves* is based on a misreading of the court of appeal's decision and a mischaracterization of the "evidence" Webb presented. For example:

- Webb contends that "the Tenth Circuit was required to take as true that plaintiff had previously been evaluated by the company as 'at or above' expectations" and that the court violated *Reeves* when it failed to do so. (*Id.*) But the Tenth Circuit expressly found that "overall Webb's performance met or exceeded expectations."[15] (App. at 2a.) The Court did not find – because there was no evidentiary basis for finding – that Webb's positive evaluations demonstrated pretext. (*See supra* at 10 ¶ 8 & n.5.)
- Webb claims that the Tenth Circuit "violat[ed] the tenants of *Reeves*" when the court rejected the allegation that Webb's firing contravened the announced RIF criteria, on the ground that a purported inconsistency identified by Webb was "insignificant." (Pet. at 25 (citing App. at 7a).) As shown below, the court neither weighed the evidence nor stated that Webb's allegation of an inconsistency was "insignificant." (*See* §III.C.2, *infra* & n.17.) Rather, the court found that Webb had failed to show an inconsistency.
- Webb asserts that he presented "other forms of circumstantial evidence," including "the background level of a workforce dominated by young people with little senior supervision, [and] a prior reassignment of plaintiff to a job that made him more vulnerable to layoff. . . ." (Pet. at 25.) Webb argues that the Tenth Circuit violated the standard set forth in *Reeves* by "weigh[ing] and discount[ing]" this "circumstantial evidence." (*Id.*)

15. Webb surely is not suggesting that a court must take such an assertion by an employee as true if an employer produces the actual performance evaluations, and they show that the employee received lower ratings.

But again, the Tenth Circuit did not weigh or discount any evidence. Rather, it concluded that these allegations either were "based purely upon speculation" (App. at 16a), or insufficient, without more, to "create an inference of discrimination." (*See* App. at 8a.) Both of these conclusions are consistent with *Reeves*, and with *Celotex*, *Anderson*, and *Matsushita*. Indeed, Webb's reliance on *Reeves*' analysis under Fed. R. Civ. P. 50 to argue that the Tenth Circuit should have given greater weight to such things as Webb's speculation about the effect of his transfer on his vulnerability to future layoffs is ironic. Because such speculation by Webb would not be admissible at trial, it would never be considered in a motion under Rule 50.

C. The Tenth Circuit Properly Applied the Summary Judgment Standard in This Case, and Thus the Petition Provides No Basis for Reversal.

In this case, the district court and the court of appeals both determined that the purported "evidence" presented by Webb was insufficient to allow a jury to return a verdict in favor of him. (App. at 20a; Supp. App. at 31a.) And examination of the issues underlying the "questions presented" by the Petition demonstrates that those courts were correct. Accordingly, not only does the Petition fail to present any question for which certiorari review is appropriate, it does not even present a basis for reversal of the Tenth Circuit decision.

1. *An employee's belief about his own qualifications and performance is insufficient to create a dispute as to a genuine issue of material fact.*

The first question presented in the Petition concerns the probative value of an employee's belief as to his or her own qualifications and performance as compared with other employees.[16] Webb's contends that he "well-established [sic]:

16. Because Webb's characterizations of the "Questions Presented" are one-sided, Level 3 rephrases them in what it considers a more neutral manner.

(1) his own qualifications, based upon his own direct knowledge of them; (2) the qualifications of comparators, who disclosed those qualifications to him; (3) his own performance, as expressed in performance evaluations by the company; [and] (4) the performance of comparators, as he directly observed it on the job. . . ." (Pet. at 18 (emphasis omitted).) Webb argues that the evidence he produced on these subjects was sufficient to establish that his inclusion in the RIF was pretextual, and the Tenth Circuit misapplied the correct summary judgment standard when it refused to consider these "objective assessments" on the ground that they were "inadmissible opinion." (*Id.* (emphasis omitted).)

Webb misstates both the evidence he presented and the Tenth Circuit's rulings. The court did not hold that evidence by Webb about the qualifications and performance of comparators could not be considered in determining whether his layoff was pretextual. *See Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195, 1197 (2006). In fact the Tenth Circuit has held in multiple cases that evidence of a disparity in qualifications may be sufficient to create a question of fact as to pretext. *See, e.g., Brooks v. Barnhart*, No. 02-1449, 78 Fed. Appx. 52, 55-56 (10th Cir. Oct. 7, 2003). Rather, in this case the Tenth Circuit found that Webb did not present sufficient evidence about the qualifications and performance of other employees:

> Webb has failed to provide any specific facts for this conclusory statement [that he had more seniority, more experience, and superior contributions when compared to his peers]. There is virtually no evidence in the record, aside from vague generalities and speculation, as to the qualifications of Webb's peers.

(App. at 13a.) Indeed, the Tenth Circuit's finding is generous to Webb. Not only did he not present evidence about the qualifications of individuals he deemed to be comparators, he did not present evidence showing that the individuals he identified were in fact comparators.

Similarly, the Tenth Circuit did not rule that Webb's performance evaluations were inadmissible opinions. What the court found was that in the context of a RIF, evidence of satisfactory performance alone is not probative of pretext

because " 'someone has to be let go, . . . including satisfactory employees.' " (App. at 13a (quoting *Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1456 (10th Cir. 1994)). And because Webb, once again, failed to produce any evidence of the performance evaluations received by supposed comparators of Webb, the court had no basis for concluding that a genuine issue of material fact existed about whether Webb's layoff was pretextual because his evaluations were significantly superior to those of his comparators.

The Tenth Circuit did conclude that Webb's subjective beliefs about the superiority of his own qualifications and performance (or the inferiority of the performance of other employees) was insufficient to prove pretext. (App. at 13a.) But that has to be the case. If an employee could create a triable issue of fact merely by expressing a heartfelt belief that he or she was more qualified or performed better than other employees, summary judgment would never be granted.

2. *Webb failed to show that Level 3 deviated from the RIF criteria.*

The second question presented in the Petition concerns an employer's alleged deviation from the established criteria in determining whether an employee will be included in the RIF. Webb contends that Level 3 "announced one set of criteria for selecting employees to be laid off (performance, skills, qualifications, tenure)" but then "informed plaintiff he was being laid off, instead, for a different reason – his job had been eliminated." (Pet. at 25.) Webb contends that the Tenth Circuit's label of this change as a "minor inconsistency" demonstrates that the court "*weighed*" the evidence, violating basic summary judgment law. (*Id.* (emphasis in original).)

Once again, Webb misreads the court's decision. The court did not dismiss Webb's assertion on the ground that the supposed change in criteria was a "minor inconsistency."[17] It did so on

17. Webb's "minor inconsistency" assertion is unwarranted, and completely misrepresents the Tenth Circuit's analysis. (*Compare* App. at 7a (quoting *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1168 (10th Cir. 1998), for "minor inconsistency" standard) *with App.* at 12a-14a (evaluating Webb's claim of deviation from criteria without mentioning "minor inconsistency").)

the ground that Webb's assertion – even if accepted as true – did not show an inconsistency between the announced RIF criteria and the statement that Webb's position had been eliminated. In the January 2003 RIF, one Program Manager II position – Webb's – was eliminated by Level 3. The selection of Webb's position (as opposed to another employee's Program Manager II position) was based on specified RIF criteria. Accordingly, the two statements are completely consistent with one another, and no reasonable jury could find that they were evidence of pretext.

3. *Webb failed to present evidence of prior discriminatory acts, and he failed to present evidence of a causal connection between the prior acts and the decision to include him in the 2003 RIF.*

Webb characterizes the third question in the Petition as whether evidence of prior acts of discrimination against him is relevant to prove pretext. But that issue is not implicated here. The Tenth Circuit did not hold, in this case or any other case of which Level 3 is aware, that evidence of prior acts of discrimination against a party is never relevant to establish pretext. Rather, the court held in this case, as it has held in numerous other cases over the past 20 years, *see, e.g.*, *Colon-Sanchez v. Marsh*, 733 F.2d 78, 81 (10th Cir. 1984), that evidence of prior discriminatory acts against a party can establish pretext if " 'the prior incidences of alleged discrimination can somehow be tied to the employment actions disputed in the case at hand.' " *Heno v. Sprint/United Mgmnt. Co.*, 208 F.3d 847, 856 (10th Cir. 2000) (quoting *Simms v. State of Okla.*, 165 F.3d 1321, 1330 (10th Cir.1999); (*see* App. at 9a, 10a.) Here, the Tenth Circuit found that Webb's allegations of prior discrimination were insufficient to establish pretext for three reasons: they were unsupported by evidence, Webb failed to make any showing of a connection between the prior allegations and his inclusion in the January 2003 RIF, and the alleged events were too remote in time to demonstrate pretext. (*See* App. at 9a-11a.)

4. *Webb's claim of post-layoff discrimination in the denial of retirement benefits was unsupported by evidence and was unconnected with the decision to include him in the 2003 RIF.*

The fourth question presented in the Petition is "[w]hether subsequent acts against an employee after termination, such as denial of retirement benefits, are relevant to prove pretext." (Pet. at ii.) Webb's attempt to use post-layoff events to prove pre-layoff discrimination founders for two reasons. First, Webb, once again, failed to produce evidence from which a jury could find that the events were due to discrimination. For example, Webb claims that the denial of retirement benefits was discriminatory. But Webb cannot dispute that he was notified that the option to receive retirement benefits would expire, that Level 3 never attempted to prevent Webb from exercising the option before it expired, and that Webb did not try to exercise that option until more than a month after it expired. *See Trotter v. Todd*, 719 F.2d 346, 349 (10th Cir. 1983) (no prima facie case where defendants complied with internal policy). Thus, to show that the decision to deny his untimely request for option benefits was due to discrimination, Webb would have to produce evidence that other employees – who were outside the ADA's protected class and who were subject to the RIF – were allowed to receive retirement benefits pursuant to the option when their requests were made untimely, even though Webb was not. Needless to say, there is no such evidence.

Second, for post-discharge actions to be probative of pretext, they, just like prior actions, must be causally connected to the discharge. But here, no causal connection existed. (Pet. at 11a.) The decision to deny Webb's untimely request for retirement benefits was not made by Leddy – the person who included Webb in the RIF – and there is no evidence that Leddy even knew about the decision. Accordingly, the Tenth Circuit correctly found that the post-termination actions about which Webb complains, such as the denial of his request to exercise untimely the early retirement option, are not probative on the issue of pretext.

5. *The implications Webb attempts to make with his rhetorical "questions presented" are baseless.*

Four of the 10 questions presented in the Petition are rhetorical. They ask whether, in a discrimination case: (a) circumstantial evidence must be considered as a whole; (b) all reasonable inferences should be drawn in the nonmovant's favor; (c) a court should conduct a "sensitive inquiry" as to discriminatory animus and pretext, and (d) issues of credibility should not be determined by the court. (Pet. at ii-iii.) And although Webb uses these rhetorical questions to imply that the Tenth Circuit did not follow basic summary judgment standards, that implication is false. First, the court's decision demonstrates on its face that the court considered the evidence as a whole. After exhaustively evaluating Webb's allegations, the court of appeals concluded: "**Based on the foregoing**, Webb has failed to present sufficient evidence of pretext to preclude summary judgment on his age discrimination claim." (App. at 16a (emphasis added).) Second, the Tenth Circuit expressly recognized its obligation to draw all reasonable inferences in Webb's favor. (*See* App. at 4a.) Third, the care taken by the Tenth Circuit in evaluating the evidence demonstrates that it performed a "sensitive inquiry" into Webb's claims. Although the decision was unpublished, the court's opinion is 20 pages long. (*See* App. at 1a-20a.) And fourth, the decision discloses that the court did not determine issues of credibility. Nowhere did it reject evidence presented by Webb on the ground that it was not credible. To the contrary, even where the court could have legitimately rejected evidence by Webb – such as Webb's belated recollection of a meeting with Leddy, *see Orta-Castro v. Merck, Sharp & Dohme Quimica P.R., Inc.*, 447 F.3d 105, 110-11 (1st Cir. 2006) – the Tenth Circuit did not do so. Instead, it accepted the evidence presented by Webb as true, and evaluated his claims based on it.

6. *The Tenth Circuit correctly found that the RIF criteria were not completely subjective.*

The penultimate question presented in the Petition is based on Webb's assertion that the criteria used in determining the employees to include in the RIF were "substantially subjective." According to Webb, this demonstrates pretext. (Pet. at iii.) Webb

misstates the rule concerning the use of subjective criteria. Pretext "is ordinarily inferred 'only when the criteria on which the employers ultimately rely are *entirely* subjective.' " *Platero v. Williams Field Servs. Co.*, No. 05-2006, 2006 WL 864851, at *3 (10th Cir. Apr. 5, 2006) (emphasis in original) (quoting *Jones v. Barnhart*, 349 F.3d 1260, 1267-68 (10th Cir.2003)). Here, as Webb's question presented implicitly concedes, "Leddy considered both objective and subjective criteria." (App. at 14a.)

Moreover, "[t]he inference of pretext in this context is based on the idea that a decision-maker could cloak his bias in an unassailable subjective judgment. Thus, when a subjective decision is made by someone *whose motives have been put in question in the case*, an inference of pretext may be appropriate." Slip Op. at 3, *Platero*, No. 05-2006 (original emphasis partially omitted). But the motives of the decision maker who included Webb in the RIF – Leddy – have never been "put in question." (*See* Supp. App. at 23a) ("There is no evidence that Mr. Leddy decided to include Mr. Webb in the 2003 reduction in force because of his age."). In fact, the opposite is true. Leddy himself was a member of the same protected class as Webb; which would tend to negate any inference of prejudice. And Leddy was also the same person who, a year and a half earlier, had made the decision to hire Webb. This fact, as numerous courts have recognized, creates " 'an inference that discrimination was not the employer's motive in terminating the employee.' " *Cartagena v. Aegis Mortgage Corp.*, No. 01-20324, 275 F.3d 46 (5th Cir. 2001) (not selected for publication) (*quoting Faruki v. Parsons S.I.P., Inc.*, 123 F.3d 315, 320 n.3 (5th Cir. 1997). Accordingly, the mere fact that some of the criteria used in selecting employees for inclusion in the RIF were subjective is insufficient for a jury to find that Webb's inclusion was discriminatory.

7. *The Tenth Circuit correctly affirmed the district court's grant of summary judgment on Webb's retaliation claim on the ground that no causal connection existed between the protected activity and the adverse employment action.*

The final question presented in the Petition concerns the correct elements of a claim for retaliation. In his complaint,

Webb alleged that his inclusion in the RIF was in retaliation for his charge, made to Isom in November 2002, that Webb had been the victim of discrimination. The district court granted summary judgment on Webb's retaliation claim, which the Tenth Circuit affirmed, on the ground that the undisputed evidence showed that the person who took the adverse employment action – Leddy – had no knowledge that Webb had met with Isom, or engaged in a protected activity at that meeting, and thus there was no causal connection between the protected activity and the adverse employment action. (*See* App. at 16a-20a.)

Webb does not seriously dispute that he was unable to present evidence of any causal connection. Instead, Webb argues that that the Tenth Circuit erred in requiring evidence of a causal connection between Webb's protected activity and his inclusion in the RIF. (App. at 16a-20a.) Webb argues that the Tenth Circuit should have applied the standard adopted in *Stone v. City of Indianapolis Pub. Utils. Div.*, 281 F.3d 640 (7th Cir. 2002). According to Webb, under *Stone*, to establish a "prima facie case of retaliation, no causal connection need be demonstrated; plaintiff need merely show that comparators who did not complain about discrimination did not suffer the adverse action." (Pet. at 29.)

Webb misstates the standard adopted in *Stone*. *Stone* does not say that that a plaintiff must only show that others who did not complain about discrimination did not suffer an adverse employment action. It says that a plaintiff must show that after complaining about discrimination, "**only he, and not any similarly situated employee who did not [complain about discrimination], was subjected to an adverse employment action**. . . ." *Stone*, 281 F.3d 640, 644 (7th Cir. 2002) (emphasis added); *see also Hudson v. Chicago Transit Auth.*, 375 F.3d 552, 559 (7th Cir. 2004). Thus, under *Stone*, Webb would have to show that he complained of discrimination, and then only he was laid off. But in light of the fact that Webb was laid off as part of a RIF, in which 49 people were laid off, he could not make that showing. Thus, application of the standard in *Stone* would not alter the result in this case. Under either standard, Webb would not be able to show a prima facie case of retaliation.

Indeed, it seems unlikely that the Seventh Circuit would apply the indirect-evidence standard adopted in *Stone* to an action involving a RIF. Because a RIF, by definition, involves the layoff of multiple employees, no employee would be able to show that only he or she, and not any employee who did not complain of discrimination, "was subjected to an adverse employment action." Application of the *Stone* standard in the context of a RIF, therefore, would effectively shield employers from retaliation claims based on indirect discrimination.

CONCLUSION

As shown above, Webb has not identified any reason why it would be appropriate for this Court to grant the Petition. Accordingly, Level 3 requests that the Petition be denied.

Respectfully submitted,

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